Petition

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IN THE

Supreme Court of the United States

October Term, 1981

FIRST NATIONAL CITY BANK,
Petitioner,

v.

BANCO PARA EL COMERCIO EXTERIOR DE CUBA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented for Review

When, in the course of a revolution characterized by nationalization of private enterprise and unlawful confiscation of American property, a foreign state brings an action in a court of the United States through one of its wholly-owned and controlled organizations, and shortly thereafter dissolves that organization, shall a United States national, the defendant in the action, be denied the right to assert a counterclaim arising from the confiscation of his property, on the ground that the state instrumentality in whose name the action was commenced was not the instrumentality used by the state to effect the confiscation out of which the counterclaim arose?

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Opinion in The Court Below

The opinion of the United States Court of Appeals for the Second Circuit appears at 658 F.2d 913 (2d Cir. 1981) and is reproduced as Appendix A. The opinion of the United States District Court for the Southern District of New York appears at 505 F. Supp. 412 (S.D.N.Y. 1980) and, in relevant part, is reproduced as Appendix B.

Jurisdiction

The opinion and order of the United States Court of Appeals for the Second Circuit were entered on August 4, 1981. A petition for rehearing en banc was denied on October 13, 1981. (Appendix C.) This petition was filed within ninety days of that date. The Court has jurisdiction

to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

Statutes and Regulations Involved

The statutes involved are Cuban Laws No. 793, 930 and 934 and Resolution No. 1 of 1961. They are reproduced in Appendix D.

Statement of the Case

This action was brought on February 1, 1961 by Banco para el Comercio Exterior de Cuba ("Bancec") against First National City Bank (now named and hereafter referred to as "Citibank") for the sum of $193,280.30 allegedly due and unpaid under a letter of credit issued by Citibank in favor of Bancec. Jurisdiction was based upon diversity of citizenship and the amount in question. 28 U.S.C. § 1332. Citibank, alleging that the Republic of Cuba is the real party in interest, asserted a right of offset, by way of defensive counterclaim, for the value of its eleven Cuban branches that were taken by the Cuban government in September 1960, and for which no compensation was paid. After trial, the district court found that for purposes of this litigation the nominal plaintiff, Bancec, was the *alter ego* of Cuba and that the unrecovered value of Citibank's branches exceeded the amount demanded in the complaint. Judgment was entered dismissing the complaint. On appeal, the court of appeals declined to hold that Bancec was an *alter ego* of Cuba for purposes of the counterclaim and remanded the case to the district court for dismissal of Citibank's counterclaim. Citibank's petition for rehearing was denied and Citibank seeks review in this Court.

Factual Background. Bancec was created on April 25, 1960 by the Revolutionary Government of Cuba (hereafter "Cuba") as Cuba's instrumentality for various interna-

tional banking and trading activities, pursuant to Law No. 793 of the Republic of Cuba. (Appendix D at 1d-14d.) All of its capital was contributed by Cuba, all of its stock was owned by Cuba, and all net revenues after reserves were "fiscal benefits," paid to Cuba. Law No. 793, Art. 1, paras. IV, V. Bancec's president was Che Guevara, who was concurrently the president of Banco Nacional de Cuba ("Banco Nacional"). *Id.*, para. XI. Bancec was managed exclusively by delegates from Cuban government ministries, placing its entire control in Cuban government hands. *Id.*, paras. XI, XIV.

The stated purpose of Bancec was "to contribute to, and collaborate with, the international trade policy of the Government and the application of the measures concerning foreign trade adopted by the 'Banco Nacional de Cuba' . . . [for] reasons of national convenience." *Id.*, para. VIII. Bancec's operations were defined by the requirement that it "[c]ollaborate with its technical and financial assistance to make feasible in foreign markets the plans adopted by the Revolutionary Government or the 'Banco Nacional de Cuba' for the expansion of commercial interchange or directly to carry forward the pertinent operations." *Id.*, para. IX(a). In aid of this primary purpose, Bancec was made the Cuban state's exclusive purchasing and banking agent in foreign commerce. *Id.*, Art. 2.

On August 18, 1960, Citibank established an irrevocable letter of credit in favor of Bancec. The credit covered a shipment of sugar which Bancec acquired from the Instituto Nacional de Reforma Agraria ("INRA"), the state sugar monopoly which had nationalized the plant that produced the sugar on January 15, 1960 (Court of Appeals Appendix at 600, ¶ 3), which had nationalized the properties of corporations engaged in sugar manufacturing and which thus "became the owner of all sugar." *Banco Nacional de Cuba* v. *Sabbatino*, 27 F.R.D. 255, 258 (S.D.N.Y. 1961).

On September 16, 1960, Cuba seized Citibank's eleven bank branches in Cuba. The seizure was effected by the Cuban militia upon orders of Che Guevara, who purportedly signed the orders over the title of president of Banco Nacional. *Banco Nacional de Cuba* v. *First National City Bank,* 478 F.2d 191, 193-94 (2d Cir. 1973). The confiscation of Citibank's assets in Cuba was found by the district court and the court of appeals in prior litigation to be retaliatory, discriminatory and without compensation, in violation of international law. *See* the decisions in *Banco Nacional de Cuba* v. *First National City Bank* at 270 F. Supp. 1004, 1010 (S.D.N.Y. 1967) and 478 F.2d 191, 194 (2d Cir. 1973). (The *Banco Nacional de Cuba* v. *First National City Bank* case, including the various opinions rendered therein, shall sometimes be referred to herein as "*Banco I.*")

On September 21, 1960, five days after the seizure of the branches, Citibank paid $193,280.30, the net amount due under the letter of credit, by crediting that sum to the account of Bancec's appointed collection agent, Banco Nacional. Citibank then applied the balance in Banco Nacional's account in reduction of Citibank's claim for the value of its branches. That setoff, asserted as a counterclaim in an action brought by Banco Nacional, has been upheld by this Court and, on remand, by the court of appeals. *Banco I,* 406 U.S. 759 (1972), *on remand,* 478 F.2d 191 (2d Cir. 1973).

On February 23, 1961, three weeks after this action was brought, Cuba dissolved Bancec and recaptured it assets, including the claim asserted in the present action. Cuba assigned to Banco Nacional those rights, claims and assets that were "peculiar to the banking business." Law No. 930, Appendix D at 12d-17d. On the same day, Cuba created a new Foreign Trade Ministry and assigned to it the remainder of Bancec's assets. Law No. 934, Appendix D at 17d-25d. One week later, on March 1, 1961, the Foreign Trade Ministry formed a new governmental

agency, Empresa Cubana de Exportaciones, and assigned to it certain of the Ministry's assets formerly held by Bancec. Resolution No. 1 under Law No. 934, Appendix D at 25d.

Early in the proceedings, the parties agreed that the claim in the case belonged to Cuba. On April 7, 1961, at the instance of plaintiff's counsel, the parties entered into the following stipulation:

> Plaintiff having represented that by virtue of Laws No. 930 and 934, both of February 23, 1961, plaintiff herein has been dissolved, and that the claim of the plaintiff involved in this proceeding has been transferred to a newly created Ministry of Foreign Trade of the Republic of Cuba.
>
> It is Hereby Stipulated, that pursuant to Rule 25-c of the Federal Rules of Procedure, the Republic of Cuba may be substituted in the place and stead of plaintiff in the above action; and
>
> It is Hereby Stipulated, that plaintiff may serve and file a supplemental complaint in the form annexed hereto [substituting the Republic of Cuba as the named plaintiff].

The district court entered an order approving the stipulation and permitting the Republic of Cuba to be substituted for Bancec as the party plaintiff and to serve an amended complaint. Although no amended complaint was served, and no formal substitution of parties occurred, the stipulation and order remained in force.

On December 31, 1961, Cuba dissolved Empresa Cubana de Exportaciones, as it had Bancec, and lodged its assets and claims, including this claim, with another agency, Empresa Cubana Exportadora de Azucar y sus Derivativos ("Cubazucar"). On May 2, 1975, plaintiff's counsel moved to substitute Cubazucar as plaintiff. That motion was denied by the district court.

The Decisions Below. The case was tried without a jury before Judge Frederick van Pelt Bryan of the United States District Court for the Southern District of New York. Judge Bryan died before rendering a decision, and the case was reassigned to Judge Charles L. Brieant. The parties stipulated that Judge Brieant render a decision based on the record, aided by Judge Bryan's bench notes. On January 4, 1980, Judge Brieant rendered his decision determining that Bancec and Cuba were *alter egos,* that Citibank's counterclaim was properly asserted, and that the unrecovered value of Citibank's confiscated property exceeded the amount demanded in the complaint. The district court entered judgment for Citibank, deciding the case jointly with a related case, *sub nom. Banco Nacional de Cuba* v. *Chase Manhattan Bank,* 505 F. Supp. 412 (S.D.N.Y. 1980). (The excerpts from the lengthy district court opinion relevant to the issue herein appear in Appendix B.) Plaintiff appealed.

On August 14, 1981, the court of appeals reversed and remanded for dismissal of Citibank's counterclaim on the ground that the counterclaim arose from wrongful state conduct in which Bancec was not an active participant. *Banco para el Comercio Exterior de Cuba* v. *First National City Bank,* 658 F.2d 913 (2d Cir. 1981). (Appendix A.) Citibank's petition for rehearing and suggestion for en banc consideration was denied on October 13, 1981. (Appendix C.)

Reasons for Granting the Writ

This case raises an important question of federal law that has not been addressed by this Court. The court below has answered that question in a way that conflicts with applicable decisions of this Court and so far departs from its own prior and contemporaneous decisions as to require exercise of this Court's power of supervision.

1. The Importance of the Question. This case calls for an articulation of federal law governing the determina-

tion of the respective legal responsibilities of a foreign state and its wholly-owned and controlled agencies and instrumentalities when the state or one of its instrumentalities has brought an action in a court of the United States.

In prior decisions, the Court has held that a foreign state which seeks the benefits of our law must submit to adjudication of the entire controversy that it has initiated. This Court has not addressed directly the question of whether a foreign state can evade such adjudication by maintaining the suit in the name of an instrumentality that it characterizes as an entity juridically separate from itself.

This case presents that issue in stark terms. Bancec was conceived at the outset of the Cuban revolution as one of a team of agencies through which the Cuban government proposed to turn to account the American property it had seized in violation of international law.[1] Bancec was aborted by the Cuban government less than a month after this action was commenced. Its counsel sought and obtained leave to substitute the Republic of Cuba as plaintiff, and as real party in interest. When, in 1975, it was evident that Cuba could gain no advantage by suing in its own right, Cuba's counsel sought leave to substitute Cubazucar as plaintiff. In short, the Cuban government has blatantly appeared in whatever guise, however transparent, seems to it best calculated to procure the aid of—but not adjudication by—the courts of the United States. In this case Cuba has, for the first time in twenty-one years of litigation, persuaded a United States court to subordinate substance to sham.[2] Unless corrected, the decision of the

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[1] The expropriation of Cuban private property came later, but still during the initial stages of Cuba's transition to a totalitarian state.

[2] In so doing, the court below repudiated the district judge, who said, after trial, "Under all of the relevant circumstances shown in this record, including the Stipulated Facts, it is clear that Bancec lacked an independent existence, and was a mere arm of the Cuban Government, performing a purely governmental function."

court below will stand as a blueprint, judicially certified, to subvert the prior decisions of this Court.

The question is of major importance in both the short and the long term. The ultimate disposition of the claims and counterclaims arising out of the Cuban confiscations in 1960 will in large measure depend upon a definitive answer to the question presented in this case; the question was raised in connection with the impact of the Iranian revolution on United States interests, and realism compels the expectation that there will be additional instances as tensions develop or increase between the United States and foreign governments in respect of international investment and commerce.

Congress and this Court have resolved several of the threshold issues that arise in connection with confiscations of U.S. citizens' assets by foreign states. Federal law dictates that a state which has violated obligations under international law is answerable for those violations when it enters the courts of another state whose nationals have been aggrieved. *National City Bank* v. *Republic of China*, 348 U.S. 356 (1955) (hereafter, "*Republic of China*"); *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972). Federal law denies immunity to a foreign state from adjudication as to the liabilities of that state incurred in connection with commercial transactions. Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* (1981) (the "Immunities Act").

The identity of a litigant and the identification of the capacity in which it has acted presents another threshold issue—frequently denominated the "*alter ego*" issue—in many cases or controversies of this character that arise in the courts of the United States. Obviously, this Court's determination of that issue will have an immediate impact on the ultimate disposition of the claims against Cuba. Indeed, recognition of that fact points to one of the clear

anomalies in the court of appeals' decision. While holding that Citibank's counterclaim could not be asserted against Bancec, the court of appeals ordered that "[t]he judgment should order that payment [by Citibank of Bancec's claim] be made in accordance with the Cuban Asset Control Regulations, 31 C.F.R. Part 515 (1980); *see* 22 U.S.C. §§ 1643-43k (1976), to await such disbursement as may be permitted by federal authorities." 658 F.2d at 920, Appendix A at 13a. However, the intent of the statute cited by the court, the International Claims Settlement Act (Claims Against Cuba and China), 22 U.S.C. §§ 1643 *et seq.*, is to provide for the determination of the *validity* and amount of the claims of U.S. claimants, many of which never had any dealings with, or claims against, Bancec. 22 U.S.C. § 1643. The appropriate "federal authorities" must be at a loss as to which of the conflicting mandates they are to follow. The guidance of this Court is needed.

The determination of the *alter ego* issue will have a substantial impact on other litigation pending in U.S. courts and on the conduct of U.S. foreign policy. Many cases arising from the Iranian revolution involved the same or a similar issue in the context of setoffs and attachments.[3] It is likely that the *alter ego* issue will remain significant in the substantive context of several remaining Iranian cases as well as in future cases in which a foreign state seeks the benefits of American law, but endeavors to evade

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[3] *See, e.g., Electronic Data Systems Corporation of Iran* v. *The Social Security Organization of the Government of Iran*, 508 F. Supp. 1350 (N.D. Tex. 1981) *and* 610 F.2d 94 (2d Cir. 1979). Although that litigation involved an assertion of jurisdiction over a foreign state or its property rather than, as in this case, the invocation of jurisdiction by the foreign state or its instrumentality, the importance of the *alter ego* issue was signaled by the Executive Branch in its comments on the Immunities Act. However, no guidance was provided by the courts, nor was there any intimation as to how the issue should be resolved in the circumstances of this and similar cases.

the responsibilities imposed by American or international law.

In our submission, the decision of the court below was incorrect and would lead to adverse consequences. Correct or incorrect, however, there can be no doubt that in view of the importance of the issue addressed by the court below, the question should be settled by this Court.

2. The Conflict with Applicable Decisions of This Court. In *Republic of China*, 348 U.S. 356 (1955), this Court declared that, in an action instituted in a court of the United States for the benefit of a foreign state, the defendant may curtail recovery by assertion of a valid counterclaim. In *Banco I*, 406 U.S. 759 (1972), this Court upheld the validity of a defensive counterclaim based on Cuba's seizure of American property without compensation in an action instituted for the benefit of that government by one of its incorporated instrumentalities. Those decisions are applicable to this case, and examination demonstrates that the decision of the court below is in irreconcilable conflict with them.

In *Republic of China*, the Chinese government brought an action against Citibank to recover the amount of a commercial deposit made with Citibank by the Shanghai-Nanking Railway Administration. Citibank sought to curtail the recovery by offsetting amounts due it by reason of defaulted obligations of the Chinese government. The offset was pleaded as a counterclaim. China sought to defeat the counterclaim in two ways. It argued that the transaction giving rise to its claim was unrelated to the transaction that gave rise to the counterclaim, 348 U.S. at 364-65, and that as a foreign sovereign it was entitled to immunity from adjudication in the courts of the United States. *Id.* at 358. This Court nevertheless sustained the counterclaim. That case cannot be meaningfully distinguished from this case.

The Shanghai-Nanking Railway Administration was an instrumentality by which China conducted a commercial

activity. The railway played no role in the transactions or occurrences that gave rise to Citibank's counterclaim against China. Nevertheless, disregarding that fact, the court below explicitly based its decision in this case on the ground that Bancec played no role in the action by Cuba out of which Citibank's counterclaim arose. The court of appeals further placed explicit reliance on the origin of Bancec's claim, to which Cuba succeeded under Law No. 934, saying, "the claim is a purely commercial one, having no connection with the revolution or the expropriations...." 658 F.2d at 919, Appendix A at 11a. However, in *Republic of China*, the claim was also a "purely commercial one," namely a claim for a debt allegedly owed by Citibank. The debt had no connection with the breach of obligation by the Chinese government that led Citibank to refuse payment of the deposit made by the Shanghai-Nanking Railway, and for which China sued as successor in interest.

The only discernible distinction is that in *Republic of China* the action was brought and prosecuted in the name of the real party in interest, while in this case Cuba, which sought and obtained leave to be substituted for Bancec, has found it expedient to abandon its own request to be substituted as plaintiff and to assert the fiction that the party seeking recovery is a state banking and trading corporation that ceased to exist more than 20 years ago. That pretense is contradicted by the statute under which Cuba owned and dominated Bancec, as well as the statutes under which it dissolved Bancec and the claim herein devolved either to Banco Nacional de Cuba or to the Ministry of Foreign Trade. The trial judge recognized the insubstantiality of Cuba's contention, holding that "the devolution of the claim, however viewed, brings it into the hands of the Ministry [of Foreign Trade] or Banco Nacional, each an *alter ego* of the Cuban government." 505 F. Supp. at 425, Appendix B at 16b.

The inescapable conflict of the decision below with the decision of this Court in *Republic of China* is further exem-

plified by the court of appeals' exposition (which we respectfully submit was erroneous) of the Immunities Act in the context of this Court's decision in *Republic of China*. The court below recognized that the counterclaim section of the Immunities Act, 28 U.S.C. § 1607, was intended "to codify the rule in *National City Bank* v. *Republic of China*." 658 F.2d at 920, Appendix A at 13a. Nevertheless, the court of appeals' interpretation of *Republic of China*, coupled with the gloss it placed on the scope of allowable counterclaims under *Banco I*, do violence to this Court's decisions in those cases and to the important question of federal law covered by the Immunities Act.

From the premise that *Republic of China* established no more than that a foreign sovereign was not immune from a counterclaim not exceeding the value of its claim, the court below concluded that the Immunities Act does not preclude, and indeed may justify, dismissal of a counterclaim against a foreign sovereign if the counterclaim did not arise from the transactions or occurrences out of which the plaintiff's claim arose. At the same time, the court of appeals conceded that the Immunities Act does not dictate its decision by observing only that the Immunities Act "does not require a different result." 658 F.2d at 919, Appendix A at 11a. However, the court's ensuing discussion contains only selective references to the Immunities Act and its history, thus incorrectly suggesting that the Act is consistent with the result it reached.

For the reasons previously indicated, it is clear that the court of appeals' construction of *Republic of China* is incorrect. It is equally clear that the court below could not properly declare, and did not accurately imply, that the Immunities Act imposes limitations on or exceptions to the broad principles declared by this Court in *Republic of China*. In its decision, the court below undertook a gratuitous, fallacious, and detrimental interpretation of the Immunities Act. In so doing, it appears to have addressed,

and by implication to have disposed of, questions of federal law that should be settled by this Court.

The purpose of the Immunities Act was to lower "the barrier of immunity" enjoyed by a foreign state that is sued in a court of the United States. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7, *reprinted in* [1976] U. S. Code Cong. and Ad. News 6605. The Immunities Act defines a "foreign state" to include any entity which is an organ of a foreign state or a majority of whose shares or other ownership interest is owned by a foreign state. 28 U.S.C. § 1603(a), (b). The Immunities Act places no limitation on the factors that the courts may consider in making a determination of the real party in interest when a wholly-owned instrumentality of a foreign government avails itself of our courts and seeks a judgment that will ultimately inure to the sole benefit of the foreign government. Nothing in the Immunities Act nor in its legislative history suggests that a foreign sovereign is entitled to immunity otherwise unavailable because it enters our courts or maintains an action therein under an assumed name.

Indeed, the Immunities Act points to precisely the opposite conclusion. The House Report proscribes execution against property of one agency to satisfy a judgment against "another *unrelated* agency or instrumentality," H.R. Rep. No. 1487, *supra,* at 29, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6628 (emphasis added), but, as is discussed below, it leaves to the courts the substantive determination of whether agencies and instrumentalities are "related." When, as appears from the record in this case, the foreign sovereign chooses to link agencies such Banco Nacional, Bancec and Cuban government ministries in an indissoluble matrix for reasons of "national convenience," it should not escape the consequences by pretending that they are unrelated.

Furthermore, the Immunities Act states that "[i]n any action brought by a foreign state [which is defined in

28 U.S.C. § 1603(a) to include the foreign state's "agency or instrumentality"] . . . the foreign state shall not be accorded immunity with respect to any counterclaim . . . to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state." 28 U.S.C. § 1607(c). The legislative history of the Immunities Act makes it clear that this provision was intended to codify the rule of *Republic of China* and that *it authorizes setoffs not arising from the same transaction upon which the plaintiff sues,* as is required under § 1607(b). H.R. Rep. No. 1487, *supra,* at 23, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6622. It is also clear that any strictures against the scope of allowable counterclaims in the Immunities Act are substantially reduced in cases in which the foreign state has expropriated the U.S. counterclaimant's property. *See* 28 U.S.C. §§ 1605(a)(3) and 1610(a)(3); H.R. Rep. No. 1487, *supra,* at 19, 28, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6618, 6627.

Inasmuch as sovereign immunity is not an issue in this case, Bancec's reliance and the emphasis of the court below upon the Immunities Act were misplaced. The Immunities Act addresses questions of jurisdiction over foreign states and procedures for attachment and execution in aid of judgments. The draftsmen of the statute made it clear that the Immunities Act was not intended to affect the substantive rights and liabilities of the parties:

> The bill is not intended to affect the substantive law of liability. Nor is it intended to affect . . . the attribution of responsibility between or among entities of a foreign state; for example, whether the proper entity of a foreign state has been sued, or whether an entity sued is liable in whole or in part for the claimed wrong.

H.R. Rep. No. 1487, *supra,* at 12, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6610.

The decision of the court below reverses the thrust of the decisions of this Court in *Republic of China* and *Banco I* and the Congressional mandate in the Immunities Act. Unless corrected, it suggests that the rules of *Republic of China* and *Banco I* would apply only in the improbable circumstance in which the entity chosen to assert the claim participated directly in the confiscation giving rise to the counterclaim. The court of appeals' decision would signal a simple method of evasion. Far from lowering the barrier of immunity accorded to foreign sovereigns, the decision of the court below would erect a new barricade behind which those foreign states that are sufficiently sophisticated could seek shelter to manipulate American law for their own purposes.

3. The Conflict of Decisions by the Court Below. On the day that the panel of the court below denied Citibank's right to assert its counterclaim against Bancec, the same panel, reversing a judgment of the district court, allowed Chemical Bank, Irving Trust Company, and Manufacturers Trust Company to set off claims that Banco Nacional asserted as successor to certain private Cuban banks that had been nationalized by Cuba. *Banco Nacional de Cuba* v. *Chemical Bank New York Trust Co.*, 658 F.2d 903 (2d Cir. 1981) (hereafter, "*Chemical Bank*").

In the *Chemical Bank* case, Banco Nacional sued to recover the balances in accounts maintained with the defendant banks in New York. The defendant banks asserted counterclaims that were based on Cuba's expropriation of Cuban Electric Company; their theory was that by the expropriation Cuba was substituted for Cuban Electric as a debtor of the New York banks. Neither before nor after Cuba acquired ownership of the private Cuban banks were they in any way involved in the transactions or occurrences out of which the New York banks' claims against Cuba arose.

The district court held that the counterclaims were valid as against Banco Nacional in its own right, but in-

valid against Banco Nacional as successor to the Cuban banks because their New York balances were not reached by the Cuban expropriations.

The court below reversed. It held that the counterclaims could not be asserted against Banco Nacional in its own right because Banco Nacional had not been involved in the acts out of which the counterclaims arose. It sustained the counterclaims against Banco Nacional as successor to the Cuban banks, on the theory that, upon nationalization, Cuba had become the owner of the private Cuban banks and had designated Banco Nacional as their successor. Therefore, said the court, the claim asserted by Banco Nacional was, in effect, property of or asserted on behalf of the Cuban government, so that the amount of the claim could be set off against obligations of the Cuban government.

The fallacy of the court below in seeing as determinative the participation of the plaintiff instrumentality in the wrong giving rise to the counterclaim is nowhere made more evident than in a comparison of this case and the *Chemical Bank* case. In this case the court of appeals held that Citibank could not assert a counterclaim to curtail Bancec's recovery because Bancec, although owned and dissolved by the Cuban government, was not shown to have played any role in the transaction or occurrence out of which the counterclaim arose. In the *Chemical Bank* case, the court below held that Chemical and the other New York banks could assert counterclaims against the Cuban government in curtailment of Banco Nacional's recovery as successor to the private banks *because those banks were owned by the Cuban government, and notwithstanding the fact that they played no role whatsoever in the transactions or occurrences that gave rise to the counterclaims.* The decisions of the court below in this case and in the *Chemical Bank* case are thus perfectly antithetical.

In yet another case arising from the Cuban confiscations, a federal court specifically determined that Bancec and the Cuban government were one and the same. The *Sabbatino* case involved a claim virtually identical to the claim in this case, arising from a sale of sugar owned by the Cuban government. *See Banco Nacional de Cuba* v. *Sabbatino*, 27 F.R.D. 255 (S.D.N.Y. 1961). The claim there asserted by Banco Nacional originally belonged to Bancec and was assigned by Bancec to Banco Nacional. Defendant Farr, Whitlock & Co. then asserted a counterclaim against Banco Nacional arising from a sale of sugar made by "the Cuban Government, acting through its agent, Banco Para El Commercio [sic]." 27 F.R.D. at 256.

Banco Nacional moved to dismiss that counterclaim on the ground that a counterclaim against Banco para el Comercio (Bancec) was not properly asserted against Banco Nacional. Judge Weinfeld denied the motion, holding that the real party in interest was the Cuban government. 27 F.R.D. at 258. Throughout the lengthy *Sabbatino* litigation, this determination was never successfully challenged.[4]

In order to find, as did the trial court, that Bancec and the Cuban government are *alter egos* for purposes of this litigation, it suffices that the Cuban government is the beneficiary of any recovery and is the real party in interest in this action. It is unnecessary to find that Bancec and the Cuban government were at all times one and the same; it is unnecessary to prove that Bancec played a key role in the physical seizure of Citibank's branches. It suffices that the ghost of Bancec will convey to the Cuban government the benefit of any recovery in this action.

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[4] While Cuba's counsel has attempted to distinguish Judge Weinfeld's decision in *Sabbatino*, by suggesting that the manner in which Cuba nationalized the sugar interests involved in *Sabbatino* differed from the manner in which it "intervened" (i.e., nationalized) the sugar interests involved in this case, it is clear that neither Judge Weinfeld's decision nor the decision of the district court in this case turned on such artificial distinctions.

For this reason, the effort of the court below to distinguish its own decision in *Banco I* is ineffective. The court below stated that in *Banco I* it had emphasized that "the issue was not whether Banco Nacional and the government could be considered alter egos in general." 658 F.2d at 918, Appendix A at 10a. Nor is that the issue in this case. The issue is whether Bancec and the Cuban government are to be regarded as *alter egos* for purposes of offset, when the Cuban government sues in the name of the nonexistent Bancec, which Cuba created, owned and dissolved over 20 years ago.

Moreover, it should be noted that the court below, in the *same* decision, held that Bancec's recovery against Citibank could not be curtailed by Citibank's claim against Cuba, but should be kept available for satisfaction of other claims against Cuba. It may well be, in the light of views expressed by another panel of the court below in *Banco I*, 442 F.2d 530 (2d Cir. 1971), *rev'd*, 406 U.S. 759 (1972), that the court sought to substitute its individual preferences for the patterns established by Congress and this Court for the disposition of United States claims against Cuba. The suggestion was made that exercise of the right of offset would "favor" some claimants as against others. That suggestion was not adopted by this Court in *Banco I*. In the *Menendez-Dunhill* litigation, *Menendez* v. *Saks & Co.*, 485 F.2d 1355 (2d Cir. 1973), *rev'd, sub nom. Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682 (1976), the court below observed that:

> The effect [of our decision] may be to give the importers a preference over other victims of Cuban expropriations. However, since this consideration was not found to be of controlling persuasiveness by the Supreme Court [in *Banco I*] we deem it to be insufficient to tip the balance here.

485 F.2d at 1373-74. This Court upheld the setoff in *Dunhill*, over a dissent that echoed Cuba's windfall argument.

425 U.S. at 734. Both the State Department and the Foreign Claims Settlement Commission clearly recognized Citibank's right of setoff, since the former so stated in *Banco I* and the latter specifically made allowance for Citibank's setoffs, pursuant to 22 U.S.C. § 1643e, in its determination of Citibank's claim. The law has long recognized the right, and presumably the consequences, of setoff, both substantively (N.Y. Debtor and Creditor Law § 151; U.S. Bankruptcy Code, 11 U.S.C. § 553) and procedurally (Fed. R. Civ. P. 13). If the law is now to be changed, it should be declared explicitly by this Court.

4. The Disregard of Determinative Undisputed Facts. This case is more than 21 years old. The trial court's determination that, for purposes of the litigation, Bancec and the Cuban government are *alter egos* was properly made, based upon the events in 1960 and early 1961 that gave rise to the action.

Cuba was then in a state of rude transition. The arguments of plaintiff's counsel, as well as the trial record, make it clear that the Cuban government, which characterized itself as revolutionary, had substituted itself for private enterprise, and was experimenting with respect to management of the properties it had taken. The instrumentalities it used for that purpose were created, altered, and dissolved with bewildering speed. Juridical entities were created for the convenience of the state. When they ceased to serve that convenience, they were terminated with extreme prejudice. Upon termination, their assets were retrieved and used by the Cuban government as best suited its purposes.

Thus, for example, the claim in this case arose from a sale of sugar that was taken from its former owners by the Cuban government. In selling the sugar, Bancec acted as the sole marketing agent of the Cuban government. Less than a month after commencement of this action, the Cuban government dissolved Bancec. The Cuban government exercised dominion over Bancec's assets; it assigned them for

administration to such agencies as suited its convenience from time to time. The claim in this case was first lodged by the Cuban government wth Empresa Cubana, which was dissolved in a matter of months; the Cuban government then lodged the claim with the ostensibly still-extant Cubazucar.

These essential facts were disregarded by the court below, which evidently based its decision on the relationship of a mature state with its seasoned trading companies. While we certainly do not concede the point, it may be that today, nearly 23 years after the advent of the Castro government in Cuba and its various commercial, industrial and agricultural components have established such a degree of autonomy that they may be treated, for certain purposes, as separate juridical entities.[5] In the context of this case, however, the court was not called on to appraise the behavior of mature trading companies in 1981, but rather the manner in which a then immature state acquired and deployed its assets.

The court below agreed "with the district court's description of Bancec's function" but said that "we reject its conclusions." 658 F.2d at 917, Appendix A at 8a. That rejection renders its decision flawed. The court erred in setting aside conclusions that, so far from being "clearly erroneous," flowed inescapably from substantial evidence. Fed. R. Civ. P. 52(a). The district court, after trial, correctly appraised the particular facts and realities of this case. The court of appeals, on the other hand, interpreted its own dictum in another case as a basis for abnegation of carefully considered acts of Congress and decisions of this Court.

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[5] Even when the identities of government controlled corporations are well established, the courts do not refrain from determining that, in appropriate circumstances, those corporations may be identified with the government for purposes of justly determining claims and liabilities. *See, e.g., Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381 (1939). It is apparent from the *Keifer* case that "appropriate circumstances" are not constricted in the fashion suggested by the court of appeals in this case.

CONCLUSION

This petition for a writ of certiorari should be granted and, upon review, the decision of the court of appeals should be reversed and the judgment of the district court reinstated.

Dated: New York, New York
November 25, 1981

Respectfully submitted,

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Appendix

APPENDIX A

Opinion of the

United States Court of Appeals

For the Second Circuit

Banco Para El Comercio Exterior De Cuba,
Plaintiff-Appellant,

v.

First National City Bank,
Defendant-Appellee.

No. 106, Docket 80-7297.
United States Court of Appeals,
Second Circuit.

Argued Jan. 26, 1981.

Decided Aug. 4, 1981.

Victor Rabinowitz, New York City (Michael Krinsky, Judith Levin, Rabinowitz, Boudin, Standard, Krinsky, & Lieberman, New York City, on the brief), for plaintiff-appellant.

Henry Harfield, New York City (Herman E. Compter, Charles B. Manuel, Jr., Cary M. Kittle, Shearman & Sterling, New York City, on the brief), for defendant-appellee.

Before Lumbard, Van Graafeiland, and Kearse, Circuit Judges.

Kearse, Circuit Judge:

This appeal is one of six decided today[1] arising from the revolution in the Republic of Cuba in the late 1950's and the

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[1] The other five are *Banco Nacional de Cuba v. Chase Manhattan Bank*, No. 80-7375, 658 F.2d 875 (2nd Cir.); *First Bank*

ensuing expropriation of properties owned by American companies. In this action, plaintiff-appellant Banco Para el Comercio Exterior de Cuba ("Bancec") brought suit against defendant First National City Bank ("Citibank") to recover $193,280 on an unpaid letter of credit.[2] Citibank counterclaimed, seeking dismissal of the complaint on the ground that Citibank's losses resulting from the expropriation of its assets by the Cuban government exceeded the amount of Bancec's claim. The United States District Court for the Southern District of New York, Charles L. Brieant, Jr., *Judge*, ruled, in a decision reported at 505 F.Supp. 412, that Citibank's counterclaim was justiciable and could properly be asserted against Bancec, and that the value of Citibank's counterclaim exceeded the value of Bancec's claim. Accordingly the district court dismissed the complaint on its merits. Bancec has appealed, challenging the district court's decision in a number of respects. Since we find merit in the argument that Citibank's counterclaims could not properly be asserted against Bancec, we reverse and remand for entry of an appropriate judgment in favor of Bancec in the amount of $193,280.

BACKGROUND

The events surrounding the Cuban revolution of the late 1950's have been reviewed by this Court, as well as others, on several occasions. We assume familiarity with the his-

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of Boston (International) v. Banco Nacional de Cuba, No. 80-7299, 658 F.2d 895 (2nd Cir.); *Banco Nacional de Cuba v. Chemical Bank New York Trust Co.*, No. 80-7209; *Banco Nacional de Cuba v. Irving Trust Co.*, No. 80-7205; and *Banco Nacional de Cuba v. Manufacturers Trust Co.*, No. 80-7215. The last three cases were consolidated for argument and were decided in a single opinion, 658 F.2d 903 (2nd Cir.).

[2] Bancec's original claim as stated in its complaint was for $217,249. The parties have agreed that, after a deduction of $23,969 for expenses that had been authorized by Banco Nacional as agent for Bancec, the net debt was $193,280.30.

torical discussion in the cases set out in the margin,[3] as well as that in our decision today in *Banco Nacional de Cuba* v. *Chase Manhattan Bank*, No. 80-7375, 658 F.2d 875 (2nd Cir.) (*"Chase"*).

A. *Bancec and Its Claim*

Bancec was organized under the laws of the Republic of Cuba by virtue of Law No. 793 of April 25, 1960, as the successor to Banco Cubano del Comercio Exterior which had been created in 1954. Law No. 793 established Bancec as "[a]n official autonomous credit institution for foreign trade . . . with full juridical capacity and capital of its own." The bank was capitalized at 6,000,000 pesos ($6,000,000), subscribed and paid for by the Republic, which transferred capital that it owned in Banco Cubana del Comercio Exterior ($3,500,000) and in Banco de Desarrollo Económico y Social ($2,500,000), the former bank for social and economic development. Its purposes included the encouragement of production of goods for export, the increase of exports without affecting essential national sources of supply, and the stimulation and diversification of foreign markets for Cuban products. In order to fulfill these objectives, Bancec was empowered, *inter alia*, "[t]o buy in the country and sell abroad all kinds of national agricultural, industrial or mining products . . . [and] to finance and grant loans and advances to national concerns or organizations that produce or may produce for foreign markets," and "to

[3] *See e.g., Banco Nacional de Cuba v. First National City Bank*, 270 F.Supp. 1004 (S.D.N.Y. 1967), *rev'd*, 431 F.2d 394 (2d Cir. 1970), *vacated and remanded*, 400 U.S. 1019, 91 S.Ct. 581 27 L.Ed.2d 630(1971), *on remand*, 442 F.2d 530 (2d Cir. 1971), *rev'd*, 406 U.S. 759, 92 S.Ct. 1808, 32 L.Ed.2d 466 (1972), *on remand*, 478 F.2d 191 (2d Cir. 1973); *Banco Nacional de Cuba* v. *Sabbatino*, 193 F.Supp. 375 (S.D.N.Y. 1961), *aff'd*, 307 F.2d 845 (2d Cir. 1962), *rev'd*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804, *on remand, sub nom. Banco Nacional de Cuba v. Farr*, 243 F.Supp. 957 and 272 F.Supp. 836 (S.D.N.Y. 1961), *aff'd*, 383 F.2d 166 (2d Cir. 1967), *cert denied*, 390 U.S. 956, 88 S.Ct. 1038, 20 L.Ed.2d 1151 (1968).

engage in all manner of active banking operations." Law No. 793, Bylaws IX(b),(f). Bancec was to be run by a Governing Board and a General Manager to be appointed by the Board. The Governing Board consisted of delegates from the Ministries of Commerce and Economy, the Department of Mines and Petroleum of the Ministry of Agriculture, and the National Agrarian Reform Institute ("INRA"). Although Bancec was required to deposit its profits with the treasury of the Republic semi-annually, the Governing Board was empowered to deduct from fiscal revenues such amounts as were deemed "essential for the proper operation" of the bank.

On August 12, 1960, Bancec entered into two written agreements relevant to its present claim. It agreed to purchase a quantity of sugar from INRA, and to sell that sugar to the Cuban Canadian Sugar Company. The contract between Bancec and Cuban Canadian Sugar was supported by an irrevocable letter of credit in favor of Bancec issued by Citibank on August 18, 1960, which Bancec assigned, for collection, to Banco Nacional de Cuba ("Banco Nacional"), the central bank of Cuba which is described in greater detail in part B, *infra*. After a series of events not here material, Citibank was called on to pay $193,280 to Banco Nacional as Bancec's agent on the letter of credit on September 21, 1960. Citibank, whose Cuban branches had been expropriated by the Cuban government just days before, credited that amount to the account of Banco Nacional, but refused to pay it to Banco Nacional and instead applied it against the amount lost in the expropriation.

On February 1, 1961, Bancec brought this action against Citibank to recover the $193,280[4] Citibank does not appear to dispute here the validity of Bancec's claim.

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[4] Thereafter Bancec was dissolved by the operation of two statutes dated February 23, 1961, Laws Nos. 930 and 934. Under Law No. 930, the rights, claims and assets of Bancec that were "peculiar to the banking business" were assigned to Banco Nacional; under Law No. 934, the assets and claims of Bancec that were

B. *The Expropriation*

As set forth in greater detail in our opinion today in *Chase,* following the installation of the revolutionary Cuban government on January 1, 1959, relations between Cuba and the United States deteriorated seriously. On July 6, 1960, Cuba enacted Law No. 851 which, inter alia, authorized the President and Prime Minister of the Republic, "acting jointly through appropriate resolutions . . . [to] proceed to nationalize, through forced expropriation, the properties or enterprises owned by physical and corporate persons who are nationals of the United States of North America . . . ."[5] Under this Law Cuba nationalized numerous American-owned corporations, branches and businesses. On September 16, 1960, under an executive order denominated "Resolution No. 2," pursuant to Law No. 851, the Cuban government expropriated and nationalized the eleven Cuban branches of Citibank.[6] Resolution No. 2 designated Banco Nacional as the instrumentality to take over these assets.

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not peculiar to the banking business, including the claim asserted in the present action, were assigned to the government's newly created Ministry of Foreign Trade, which was to establish state trading corporations for the conduct of international trade, and for whose obligations the Ministry was not to be liable. Pursuant to Law No. 934, Empresa Cubana de Exportaciones was created to conduct all commercial activity previously conducted by Bancec, and, upon its dissolution on December 31, 1961, that corporation was succeeded by the still extant Empresa Cubana Exportadora de Azucary sus Derivados (Cuban Enterprise for Export of Sugar and its Derivatives), with respect to the rights of Bancec relating to foreign commerce in sugar and its derivatives.

[5] The translations of Law No. 851 provided by the parties in *Chase, supra,* and *First National Bank of Boston (International)* v. *Banco Nacional de Cuba, supra* note 1, respectively, differ somewhat from that provided in the present case, as well as from each other.

[6] The Cuban branches of Chase Manhattan Bank and First National Bank of Boston were nationalized pursuant to the same Resolution. All other private banking interests, other than Canadian, were nationalized pursuant to Law No. 891 on October 13, 1960. Canadian banks were nationalized later.

Banco Nacional, since its formation in 1948, had functioned as the central Bank of Cuba. It engaged in domestic and international banking and was the sole depository of state funds. In addition it had extensive powers both to control and protect the Cuban currency in international trade and to regulate all commercial banks operating in Cuba. Following the revolution, Banco Nacional was placed in control of the assets and businesses of all nationalized private banks.

C. *Citibank's Counterclaims*

Citibank counterclaimed against Bancec for losses resulting from the expropriation of its branches by the Cuban government, contending that Bancec was indistinguishable from the Cuban government. Alleging that its losses far exceeded the amount of Bancec's claim, Citibank sought dismissal of the complaint. It did not seek an affirmative award of damages.

D. *Decision of the District Court*

A bench trial was held before the late Judge Frederick van Pelt Bryan who died before being able to render a decision. Thereafter the case, along with several companion cases, was reassigned to Judge Brieant who, upon consent of the parties, rendered a decision on the basis of the record made before Judge Bryan. Judge Brieant held that Citibank's counterclaim was justiciable and was properly asserted against Bancec. Because he found that the value of Citibank's losses far exceeded the value of Bancec's claim, judgment was entered dismissing Bancec's complaint on the merits.

On appeal, Bancec attacks the judgment of the district court in several respects. It contends, inter alia, that Bancec is not an alter ego of the Cuban government for purposes of Citibank's counterclaims, that the counterclaim, even if asserted against the proper party, is nonjusticiable

under the act of state doctrine, and that Citibank's losses from the expropriations have been compensated by setoffs in prior litigation. Since we agree that the counterclaim for expropriation of the branches was not assertable against Bancec, we reverse on that ground.

DISCUSSION

Bancec's contention that Citibank's counterclaim may not be asserted against it is based on the premise that the expropriations were carried out by the Cuban government without participation by Bancec, and that Bancec was a distinct juridical entity in its own right, separate and apart from the Cuban government. It argues that the counterclaim must therefore be asserted against the Cuban government, and not against Bancec.

The district court rejected this proposition for a variety of reasons. First, it noted that all of Bancec's capital had been contributed by the Cuban government, and that Bancec had no function except to manage the export of commodities for the account of the government. Thus, it was a creature of the Cuban government, engaged in a state function. 505 F.Supp. at 425. The court stated that it saw no legal or factual basis for distinguishing between Bancec and Banco Nacional insofar as the identity of either with the Cuban government was concerned, 505 F.Supp. at 427, and found Bancec to be an alter ego of the Cuban government to the same extent and "for essentially the same reasons" as Banco Nacional was such an alter ego, *id.* at 423; in ruling that Banco Nacional was an alter ego of the Cuban government,[7] the district court relied on our opinion in *Banco Nacional* v. *First National City Bank*, 478 F.2d 191, 193-94 (2d Cir. 1973), as dispositive. 505 F.Supp. at 429-30. Finally, apparently recognizing that Law No. 793 had

[7] This ruling was made in the *Chase* suit; Judge Brieant rendered his decisions in both the present case and *Chase* in a single opinion.

created Bancec as a separate juridical entity, the court stated that since the equities were so strongly in favor of Citibank, it would recognize the practicalities of the situation: "Doing justice in this case should not be obfuscated or side-tracked by self-serving recitals in post-revolutionary statutes of the Cuban Government, undoubtedly drawn with litigation of this sort in mind. The Court concludes that Bancec is an *alter ego* of the Cuban Government."[8] 505 F.Supp. at 428.

While we agree with the district court's descriptions of Bancec's functions and its status as a wholly-owned instrumentality of the Cuban government, we reject its conclusions. Our 1973 ruling that Banco Nacional was the alter ego of the Cuban government for purposes of the counterclaims by Citibank against Banco Nacional had a precise basis that does not exist with respect to Bancec, and we conclude that Bancec was not an alter ego of the Cuban government for the purpose of the present counterclaims.

As a general matter, we start with the proposition that an instrumentality of a government is not necessarily an alter ego of that government for all purposes. If the instrumentality has been created as a separate and distinct

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[8] The court properly rejected Citibank's alternative theory for recovery in the event Bancec was not held to be an alter ego of the Republic of Cuba. This theory argued that the real party in interest here is Banco Nacional and not Bancec, because it was Banco Nacional that held the letter of credit as agent for collection. Under this view of the letter of credit transaction, Bancec would stand as a beneficiary of Citibank's promise to pay Banco Nacional and its rights would be subject to Citibank's setoff against Banco Nacional. Judge Brieant correctly ruled that Citibank, dealing as it was with an agent for a disclosed principal cannot set off Banco Nacional's indebtedness against the amount it owed to Bancec. *See Fuller v. Fasig-Tipton Co.*, 587 F.2d 103, 106 (2d Cir. 1978). Even if Citibank did not have actual knowledge of the agency relationship—although it would seem unlikely that it did not—it was on notice, given the statutory presumption accompanying negotiable instruments deposited or received for collection. *See* N.Y. Negotiable Instruments Law § 350-a (repealed effective Sept. 27, 1964 as to transactions occurring after that date). *See* 505 F.Supp. at 425-27.

juridical entity under the laws of the state that owns it, we will normally respect its independent identity for a number of purposes. For example, we will not generally hold that the presence of the instrumentality in the United States is sufficient to give a United States court jurisdiction over the government of the state that created it. *See, e. g., National American Corp.* v. *Federal Republic of Nigeria,* 448 F.Supp. 622, 637 n.26 (S.D.N.Y. 1978), *aff'd on other grounds,* 597 F.2d 314 (2d Cir. 1979). And we will recognize that two distinct entities exist sufficient that an agreement of agency could be formed between them. *See, e. g., East Europe Domestic International Sales Corp.* v. *Terra,* 467 F.Supp. 383, 387-88 (S.D.N.Y.), *aff'd,* 610 F.2d 806 (2d Cir. 1979).

We will, on the other hand, ignore the statutory distinction between the state and its instrumentality when the subject matter of the counterclaim assertible against the state conduct in which the instrumentality had a key role. This was the basis of our affirmance in *Banco Nacional* v. *First National City Bank, supra.* Thus, our opinion described the expropriation of Citibank's branches, and Banco Nacional's role in it, as follows:

> On Friday, September 16, 1960, the takeover of National City Bank's assets in Cuba began. Late in the day, the vice-president of National City Bank in charge of Cuban operations, Juan D. Sanchez, began to receive telephone calls from the officers in charge of the branches of National City Bank in Cuba indicating that the Cuban militia were demanding the keys to the National City Bank's properties. At 11:00 P.M. on the 16th, Sanchez contacted one Bustabad, a member of the militia and a delegate of the bank employee's [*sic*] union. Bustabad stated that the militia had received orders *from Banco Nacional de Cuba* to occupy all of National City Bank's branches.
>
> On the night of the 16th all of National City Bank's branches were occupied by the Cuban militia acting on orders from officials of Banco Nacional.

> On Monday, September 19th, Sanchez, at the instructions of Cuban officials, appeared at the main office of National City Bank in Havana. Here he found armed men patrolling the bank, men who were members of the bank employee's [*sic*] branch of the militia. Sanchez was officially informed of the nationalization and told that Banco Nacional officials were taking over the operation of the bank. The official order nationalizing the bank was signed by Che Guevara, Minister of State, as President of Banco Nacional.

Id. at 193-94 (emphasis in original). We concluded that Banco Nacional and the government of Cuba had acted as alter egos in the expropriation and hence were to be so regarded with respect to the counterclaim in that lawsuit.

Our ruling in the *Banco Nacional* case was carefully limited to the circumstances in which the counterclaim was based on the acts of expropriation that were performed principally by the instrumentality that was a party. Thus, we reiterated that Banco Nacional and the Cuban government were alter egos "in the nationalization," *id.* at 193, "in the expropriation," *id.* at 194, "in implementing the nationalization policy," *id.*; and we stated that our conclusion was reached "for the purposes of this litigation." *Id.* at 193; *id.* n.1. We ended this section of our opinion by emphasizing that the issue was not whether Banco Nacional and the government could be considered alter egos in general; the "decisive" fact was the role of Banco Nacional in the expropriations that were the subject of the Citibank counterclaims:

> Appellant urges that Banco Nacional was an independent juridical entity, an "autonomous organization" free from the control of the Cuban government. However, we are not concerned with any theoretical overall relationship between the bank and the Cuban government. The decisive facts here are those which

> show the function of Banco Nacional in the expropriation of National City Bank's property in Cuba. Those facts clearly indicate Banco's active role as a mere arm or division of the Cuban government.

Id. at 194.

The circumstances with respect to Bancec are materially different. Although Bancec was an instrumentality of the Cuban government, it was principally engaged in promoting foreign trade. It was this engagement that gave rise to the claim it asserts in the present lawsuit. The claim is a purely commercial one having no connection with the revolution or the expropriations—except that the expropriation led Citibank to refuse payment. And Citibank has not shown that Bancec played any role whatever in the expropriations of the Citibank branches. Since Bancec had no connection with the subject matter of the Citibank counterclaims, we will not rule, for the purposes of the present litigation, that Bancec was an alter ego of the Cuban government.

The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-11 (1976), assuming it may be applied retroactively to affect this action,[9] does not require a different result. That Act was intended to clarify that foreign states are not immune from the jurisdiction of the United States courts for acts done in the course of their commercial activities in the United States. Despite the fact that § 1603 of the Act defines a state to include its instrumentalities, and § 1607(c) provides that a foreign state as plaintiff is not immune from an offsetting counterclaim, other sections of the Act show that differences between a state and its instrumentalities are intended to be recognized. Section 1610, for example, treats states

[9] The FSIA, which became effective on January 21, 1977, sixteen years after the commencement of this action, states that "henceforth" claims of foreign states to immunity should be decided under the principles set forth in the Act. 28 U.S.C. § 1602.

and their instrumentalities differently: it subjects all of the property of an instrumentality to execution upon a judgment on a claim against it, whether or not the property had any connection with the claim, § 1610(b); but it subjects the property of a state itself to execution only if the property "is or was used for the commercial activity upon which the claim was based", § 1610(a)(2). Thus, it appears that by including a state's instrumentalities within the definition of a state, Congress intended to make instrumentalities amenable to suit on account of any commercial activity they conduct within the United States; but it does not appear that Congress intended to subject an instrumentality to liability for acts or transactions with which it had no connection, which were done or entered into by other agencies or instrumentalities of the state.

This reading of the FSIA is supported by the legislative history of the Act, which is rich in disclaimers of any intention to cause the courts willy-nilly to pierce the corporate veils of foreign entities such as trading corporations. Thus, the House of Representatives Committee report on the FSIA bill stated that the "bill is not intended to affect the substantive law of liability. Nor is it intended to affect ... the attribution of responsibility between or among entities of a foreign state; for example, whether the proper entity of a foreign state has been sued, or whether an entity sued is liable in whole or in part for the claimed wrong." H.R.Rep.No.94-1487, 94th Cong., 2d Sess. 12(1976), *reprinted in* [1976] *U.S. Code Cong. & Ad.News* 6604, 6610. Similarly, with respect to § 1610, the Report stated as follows:

> Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality. *See Prelude Corp.* v. *Owners of F/V Atlantic* , 1971 A.M.C. 2651 (N.D.Calif.). There are compelling reasons for this. If U.S. law did not respect the separate juridical identities of different

> agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary. However, a court might find that property held by one agency is really the property of another.

Id. at 6628-29 (citations omitted). Consistent with these disclaimers, the Report stated that § 1607(c), the counterclaim section, was intended simply to codify the rule in *National City Bank* v. *Republic of China,* 348 U.S. 356, 75 S.Ct. 423, 99 L.Ed. 389 (1955). That case established that a foreign sovereign was not immune from a counterclaim not exceeding the value of the sovereign's claim; it said nothing about asserting such counterclaims where the state was absent and suit had been brought by an instrumentality in its own right.

In short, we decline to hold that a trading corporation wholly owned by a foreign government, but created and operating as a separate juridical entity, is an alter ego of that government for the purpose of recovery for wrongs of the government totally unrelated to the operations, conduct, or authority of the instrumentality.

CONCLUSION

We reverse the judgment of the district court and remand for dismissal of Citibank's counterclaims and for such further proceedings as may be necessary. If, as appears, Citibank does not contest the validity of Bancec's claim, judgment should be entered for Bancec in the amount of $193,280.30 together with such prejudgment interest as may be appropriate. The judgment should order that payment be made in accordance with the Cuban Asset Control Regulations, 31 C.F.R. Part 515 (1980; *see* 22 U.S.C. §§ 1643-43k (1976), to await such disbursement as may be permitted by appropriate federal authorities.

APPENDIX B

Opinion of the

United States District Court

For the Southern District of New York

(Excerpted)

Banco Nacional De Cuba,

Plaintiff,

v.

Chase Manhattan Bank,

Defendant.

Banco Para El Comercio Exterior De Cuba,

Plaintiff,

v.

First National City Bank,

Defendant.

Nos. 60 Civ. 4663—CLB, 61 Civ. 0410—CLB.

United States District Court,
S. D. New York.

Jan. 4, 1980.

Rabinowitz, Boudin, Standard, Krinsky & Lieberman by Victor Rabinowitz, New York City, for Cuba.

Milbank Tweed Hadley & McCloy by Andrew J. Connick, New York City, for Chase Manhattan Bank.

Shearman & Sterling by Charles Manuel, New York City, for First Nat'l City Bank.

• • • •

BRIEANT, District Judge.

The first of these actions was filed November 28, 1960 by Banco Nacional de Cuba (hereinafter "Banco Nacional") against Chase Manhattan Bank (hereinafter "Chase"). The second above entitled action was filed February 1, 1961 by Banco Para el Comercio Exterior de Cuba (hereinafter "Bancec") against First National City Bank (hereinafter "Citibank"). Both cases arise out of events following and connected with the recent Cuban Revolution and the consequent change in the economic, social and political structure of the Republic of Cuba.

These cases are two out of a larger number of similar cases pending in this Court. By separate orders made on August 7, 1961 by Hon. Sylvester J. Ryan, then Chief Judge of this Court, each of these cases were assigned for all purposes to Hon. Frederick vanPelt Bryan, pursuant to Rule 2 of the Civil Rules of this Court as then in effect. The cases were tried before Judge Byran, who thereafter departed this life on April 17, 1978.

Following the death of Judge Bryan, these cases were reassigned to me, and the parties have stipulated and agreed through their counsel that the issues may be resolved by the Court based upon all the proceedings and papers before the late Judge Byran, without the necessity of reopening the trial record, taking additional proof or observing the demeanor of any witnesses.

The Court has subject matter jurisdiction of the respective complaints under 28 U.S.C. § 1332(a)(2). The counterclaims pleaded in each case are conceded to be recoverable only as set-offs to the extent that a plaintiff prevails on its respective complaint.

Although these cases have not been consolidated, they present related issues of fact and law, and the post-trial hearings before me were conducted jointly. Accordingly,

and to avoid repetition it seems appropriate that the issues presented be determined in a single decision.

Familiarity is assumed with the stipulated and conceded facts in these cases, which will not be recited except to the extent necessary for an understanding of the issues presented. Familiarity is also assumed with the prior litigation tried before the late Judge Bryan, *Banco Nacional de Cuba* v. *First National City Bank,* 270 F.Supp. 1004 (S.D. N.Y.1967), *rev'd* 442 F.2d 530 (2d Cir. 1971), *rev'd* 406 U.S. 759, 92 S.Ct. 1808, 32 L.Ed.2d 466, *reh. denied* 409 U.S. 897, 93 S.Ct. 92, 34 L.Ed.2d 155 (1972); *on remand* 478 F.2d 191 (2d Cir. 1973) (hereinafter "Banco I"). Plaintiffs have reserved their right to relitigate on subsequent appeal the legal points determined in the *Banco I* case, but their counsel concedes that for purposes of proceedings in this district court, those issues are precluded by the plurality opinions of the Supreme Court in 406 U.S. 759, 92 S.Ct. 1808, 32 L.Ed.2d 466 *et seq.* and the determination on remand in 478 F.2d 191. For additional discussion of these issues, see *Banco Nacional de Cuba* v. *Sabbatino,* 193 F.Supp. 375 (S.D.N.Y.1961), *aff'd* 307 F.2d 845 (2d Cir. 1962), *rev'd* 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964); *on remand, sub nom. Banco Nacional de Cuba* v. *Farr,* 243 F.Supp. 957 and 272 F.Supp. 836 (S.D.N.Y.1965), *aff'd* 383 F.2d 166 (2d Cir. 1967), *cert. denied* 390 U.S. 956, 88 S.Ct. 1038, 20 L.Ed.2d 1151, *reh. denied* 390 U.S. 1037, 88 S.Ct. 1406, 20 L.Ed.2d 298 (1968), and also the legislative history leading to the enactment of the so-called "Hickenlooper" or "Sabbatino" Amendment, now 22 U.S.C. § 2370(e)(2), passed by Congress to frustrate in part the apparent or perceived rule of the Supreme Court in the *Sabbatino* case.

II

Background

There is much literature concerning the events in Cuba following the overthrow of the Batista Government. Much

of this literature is partisan in nature and of no assistance in setting forth the background of events described below. Sufficient it is to state that the effective date of the revolution in Cuba, which began in the Sierra Maestra Mountains in December 1956 is generally agreed to have been January 1, 1959.

Almost immediately after the overthrow of the Batista administration, a national government was established by Castro, Che Guevara and others, which concentrated under one hand all the executive and legislative functions of the Cuban Government. The Castro Government regarded itself as a lawful continuum of the pre-existing government of the Republic of Cuba and built for the most part on pre-existing law and institutions, making substantial but piecemeal changes to effect its revolutionary goals. Following the assumption of power it began a swift sequence of social changes in Cuba's internal affairs, and in its relationships with foreign powers and the aliens then resident in Cuba.

Almost immediately, new currency control regulations were imposed, and those regulations were gradually tightened. Banco Nacional was restructured internally in the fashion described below, and it became the sole official licensor of all foreign payments and any remissions of profits earned in Cuba by alien owned enterprises. From time to time, amendments to these regulations and changes in the policy under which they were administered, contrived to place continuously greater limitations on international trade with Cuba. Also limited thereby was the transaction of domestic business in Cuba, including banking, and the enjoyment of property, by foreigners.

Following the revolution, many members of the propertied and professional classes in Cuba took refuge in foreign countries; they fled the realm. Cuba began a swift and purposeful transition from an economy in which

most of the means of production were owned and controlled by private individuals and firms, both native and alien, to a nation where the economy was more closely controlled by Government, and where the Government directly or indirectly assumed ownership and operation of the means of production. This new Government has been described loosely in the briefs as a "socialist" Government. At least within the classical definition of these words, it was not. In socialism, we are taught that the workers own and control the means of production. In Cuba, after the revolution, the Cuban Government owned and controlled the means of production, to a gradually increasing extent. The resulting internal organization may best be described as "state capitalism."

By various statutes and decrees, ownership and control of the properties and businesses of those who fled Cuba following the revolution became vested in the Cuban Government. On May 17, 1959 an "agrarian reform law" was enacted, looking towards nationalization and dismemberment of large land holdings in a nation which had previously founded its economy largely on the production of sugar for export. This agrarian reform was administered by an arm of the Cuban Government known as INRA (El Institutio Nacional de Reforma Agraria), which proceeded to act in the nature of a state-owned trading corporation, owning the sugar production facilities and disposing of the export sugar crop. Persons or entities called "interventors" were appointed by the Cuban Government to confiscate and conduct numerous business enterprises owned by absentees, native and foreign.

In November 1959, Banco Nacional de Cuba, the central bank of the Republic of Cuba, was reorganized, and Che Guevara was appointed President of Banco Nacional.

These significant social changes, hereinafter referred to in totality and for simplicity as "the social changes"

were accompanied by the usual rhetoric, and by promises, viewed and intended to be viewed by some as threats, that more of the same was to follow shortly. And it did.

Sugar in the world market had been a surplus commodity for many years. Cuban sugar producers had been granted an import quota, politically administered and changed annually, for sugar to be licensed by the United States Government for importation into the American market. In the United States, the price of sugar has traditionally been maintained at a level above the world competitive price, and close to the marginal costs of American beet and cane sugar producers, in order to insure survival of domestic producers. The administration and allotment of the sugar import quotas had been an essential part of American foreign policy for many years in dealing not only with Cuba, but with other sugar producing nations. Adjustments in the sugar quota were treated as diplomatic rewards and punishments for foreign nations producing sugar, based upon their international conduct, their perceived friendliness, and treatment accorded to American nationals.

As a result of rapidly deteriorating foreign relations between the new Cuban Government and the United States, and the abhorrence which nature has for a vaccum, even in diplomacy, the Soviet Union, on February 13, 1960, was able to enter into a barter-type commercial agreement with Cuba by which large quantities of Cuban sugar were permitted to enter Russia and Russian-dominated trading partners where that sugar had not previously been sold. That sugar was to be paid for in merchandise, including, but not limited to armaments produced in the Soviet Union. The United States reacted to this perceived disloyalty or threat to its security by in effect abolishing Cuba's share of the sugar quota, and preventing entry of Cuban sugar into the United States market. See 74 Stat. 330 (1960), which became a law on July 6, 1960.

On July 6, 1960, as an immediate response to the enactment of the aforementioned statute repealing the Cuban sugar quota, the Cuban Government enacted Law No. 851 providing for the nationalization of the businesses and properties located in Cuba of United States citizens. On August 6, 1960, twenty-six United States owned corporations, branches or businesses were nationalized. Interventors were appointed to run each of these businesses for the Cuban Government, and no compensation was made, then or since, to the American owners. On September 16, 1960, United States banking operations in Cuba operated by Chase, Citibank and others were confiscated in the fashion set forth below in greater detail.

Diplomatic relations between the two countries came to an end; transfer of funds between the United States and Cuba was interdicted in both countries. So it remains today.

III

Organization of Banco Nacional

Banco Nacional was organized by Law No. 13 of December 23, 1948, effective December 30, 1948. Prior to the revolution it was the central bank of Cuba. It had all of the powers of a local commercial bank within the Republic of Cuba, and was engaged in national and international banking. It also exercised the administrative and fiscal powers of government over private banking, much to the same extent that the Federal Reserve System does in the United States, or as the Bank of England or any other central bank, is accustomed to do in the countries allowing private internal or international trade and banking.

One-half of the stock of Banco Nacional had been subscribed for and issued to the Government of the Republic of Cuba. Prior to the Cuban Revolution of 1959, the re-

maining half had been issued to subscribing private banks, which were required to participate. Its president and three out of five directors were appointed by the Republic. The Government shared in the profits of the Bank after the payment of dividends to its shareholders and appropriations to reserves. Banco Nacional had the sole power to issue currency in the Republic of Cuba, such currency being regarded as an obligation of the Cuban state. It set maximum interest rates for private banks, acted as fiscal agent and economic advisor to the Government, and as agent for the Currency Stabilization Fund created simultaneously and by the same Law No. 13 of 1948.

Prior to the Revolution, Banco Nacional had acted as the representative of the Cuban Government in the International Monetary Fund and the International Bank of Reconstruction and Development. It was exempted from taxation, was the sole designated depositary of state funds, had the power to make loans to the Currency Stabilization Fund and possessed detailed powers and corporate purposes to assist the Currency Stabilization Fund in the exercise of the latter's duty to protect the national currency in international trade. Under Cuban law Banco Nacional had the power to sue and could be sued, and had a specifically authorized capital. Under domestic law it was not liable for any of the duties or obligations of the Cuban Government or any other agency, and its liability was limited to its own capital and assets. That is to say, the Government was not responsible for its debts.

Banco Nacional was given the power to regulate the operations of existing commercial banks and "any other natural or artificial person" habitually engaged in banking. Banks already established prior to 1948 were required to register with Banco Nacional, and upon doing so could continue their business, subject to the regulation of Banco Nacional.

After the Revolution, and particularly by Resolution No. 2 of Law No. 851, dated September 17, 1960, and by Law No. 891 of October 13, 1960, discussed below, Banco Nacional assumed a number of additional governmental functions. There was a studied effort to preserve a continued corporate existence, while reorganizing the central bank to conform it to the new order. Banco Nacional became thereby wholly owned by the Cuban Government as sole shareholder, with all assets and profits vested in or accruing to the Treasury of the Cuban Government. Banco Nacional can be regarded as an essential element or arm of the present Cuban Government, at least at all times on and after September 17, 1960, and perhaps earlier as a result of *de facto* assumption of absolute control. This status of Banco Nacional as an *alter ego* of the Republic of Cuba had been confirmed and adjudicated before. *Banco I*, 478 F.2d 191, 193 (2d Cir. 1973).

As a foundation on which further legislation could be based, the Cuban Revolutionary Government enacted the "Fundamental Law," effective February 7, 1959. Article 24 of this Fundamental Law regulated confiscation of property by the State. In principle, it barred any deprivation of property except by "competent judicial authority, for justified reasons, . . . and always upon due payment of adequate indemnity." However, Article 24 contained an exception to this general rule, which was relied on as authority for the numerous expropriations that were to come. This exception authorized the confiscation of property held by the "Tyrant" [Batista, the prior dictator] and any of his collaborators "responsible for the crimes committed against the national economy . . . or who have enriched themselves illicitly."

Pursuant to Article 24's provision for the expropriation of property, Law No. 851 was enacted on July 6, 1960. This conferred full authority upon the President and the

Prime Minister of the new government to nationalize, through forced expropriation, property held by United States nationals. The President and the Prime Minister were given the power to appoint persons or agencies necessary to administer the nationalized properties, and the appraisers to determine the value of the properties. Law No. 851 provided for payment to be made, based on the appraised value, for the property expropriated.

Law No. 851 was executed through resolutions, only one of which is relevant here. Resolution No. 2, signed by President Torrado and Prime Minister Castro on September 17, 1960, ordered that all the property of Chase, Citibank and The First National Bank of Boston be nationalized through forced expropriation, and that the President of Banco Nacional administer the assets and the banking businesses of these firms. Further, the resolution declared that the member of the Board of Directors of Banco Nacional who was appointed by the "foreign" banks pursuant to Law No. 13, Article 23 (enacted December 23, 1948) would cease to represent the nationalized banks while on the Board. In accordance with this resolution, the branch banks and the assets in Cuba of Citibank, Chase and The First National Bank of Boston were expropriated.

Law No. 851 and the accompanying Resolution No. 2 were both promulgated for the stated purposes of defense of the national sovereignty and protection of the economic development process of Cuba, and to remove a perceived imperialist threat on the part of the banks. The next step in further nationalization of property was the adoption of Law No. 890 and Law No. 891, which were enacted together on October 13, 1960.

Law No. 890 nationalized the "large industrial and business enterprises [other than banks, including railroads] which [had] not yet adapted . . . to the revolutionary reality."

IV

Nationalization

Law No. 891 of October 13, 1960 was entitled as the "Bank Nationalization Law." Its preamble noted that the monetary and credit policy forms part of the general economic policy of the Government and performs a fundamental strategic function in the assignment and orientation of the productive resources of the country; that it was essential to change the old banking structure of the nation, and adjust to the new conditions of economic development created as a consequence of the revolutionary process, and that the creation of currency and extension of credit should be public functions, vested exclusively in the State in accord with the requirements of economic planning, and should not be in the hands of private concerns, which operate under the urge of profit and with greater consideration to individual than to collective interests. The preamble adjudged that is was necessary, to achieve the foregoing objectives, to nationalize and expropriate in favor of the State *all* the national private banking concerns that operate in the nation as a step precedent to the definitive structure of the national banking system.

Law No. 891 by Article I declared the banking function public, to be carried only by the State, through the organs created for that purpose. By Article III of that Law it was ordered that the nationalization and subsequent adjudication to the Cuban State ordered in the preceding Article be effected through Banco Nacional de Cuba as the autonomous body charged with moving the banking function of the State. Banco Nacional was declared to be the legal successor, subrogated in the place and stead of a natural or juridical person engaged as a banker, and it was legislated that upon the "consequent taking over of Banco Nacional de Cuba of the assets and liabilities of the juridical persons or companies affected by this law" they were declared dissolved and extinguished. Article V of the Law provided that the partners or stockholders of the juridical persons or companies

dissolved or extinguished were entitled to the right of indemnity resulting from the appropriations ordered, and that payment will be made by liquidating the corporate credits or shares as well as the dividends or profits earned up to the effective date of this Law "according to the system of appraisal selected by the President of the Bank" (Banco Nacional de Cuba) at the close of operations December 31, 1960. Additional provisions are set forth requiring the issuance of bonds for part of the amounts due. The statute provided that Banco Nacional "shall assume liability for the deposits existing in the banks" affected by the Law, and shall "guarantee the owners thereof as to the normal handling of the operations related thereto."

The Board of Directors and the assembly of stockholders of Banco Nacional were "dissolved" and their functions assumed by the President of the Bank under the advice of a Consultative Council of the highest ranking officials of other specialized banks. The Currency Stabilization Fund, established June 10, 1939 was dissolved and reorganized. By Article XVI, two Canadian banks, Royal Bank of Canada and Bank of Nova Scotia, were exempted from nationalization. These were acquired later.

Law No. 930, adopted February 23, 1961, reorganized Banco Nacional de Cuba further. It purported to continue the independent juridical status and patrimony of the Bank, but also provided that it should exercise the monetary sovereignty of the nation, the monopoly of the power to issue currency.

• • • •

VI

Bancec's Status

Plaintiff in the second above entitled action, Banco Para el Comercio Exterior de Cuba, referred to by the parties for convenience as "Bancec," was a Cuban bank established by Law No. 793 of May 4, 1960. As can be seen below, it

too is properly regarded as an *alter ego* of the Cuban Government to the same extent that Banco Nacional has been so found to be, and for substantially the same reasons.

For an understanding of the relevant corporate history of Bancec, we must digress slightly, to describe the claim asserted here in its behalf.

As a result of the Agrarian Reform Act of May 17, 1959, INRA had become the owner of a cargo of animal feed sugar sold by Bancec pursuant to contract for delivery into the United States. The contract was supported by an irrevocable letter of credit in the favor of Bancec, issued in New York on August 18, 1960 by Citibank in the amount of $650,000 U. S. funds payable at sight on readiness to discharge in a U. S. port. On that date, Citibank was operating its branches in Cuba. The "intervention" of its branches and those of Chase, discussed herein, did not take place until September 17, 1960.

On September 15, 1960 Citibank received from Banco Nacional for collection, a sight draft and supporting documents authorizing payment of $193,280.30 for a portion of the sugar actually delivered and discharged at Pascagoula, Mississippi. On September 20, 1960, following intervention, Citibank "paid" the draft to the account of Banco Nacional and purported to set-off the proceeds against the value of its Cuban branches, then in possession of Banco Nacional.

By Law No. 930, dated February 23, 1961, Bancec was dissolved, and Banco Nacional succeeded to all the assets, rights and claims of Bancec "peculiar to the banking business." No disposition of any other assets or claims of Bancec was made in Law No. 930.

At the time of the enactment of Law No. 930, the claim sued upon herein had the status of a draft upon an irrevocable letter of credit. Such a *res* or chose in action is regarded as being the sort of asset, right and claim peculiar

to the banking business, and accordingly, probably should be regarded as vested in Banco Nacional as of February 23, 1961. In any event, Banco Nacional had previously made claim on Citibank as the collecting agent.

Thereafter, by Law No. 934, promulgated on the same day, the assets and claims of Bancec *not* peculiar to the banking business were vested in the Ministry of Foreign Trade of the Government of Cuba. This governmental body was authorized to establish entities, in the nature of state trading corporations, under its supervision to conduct foreign trade. This law provided that the Ministry was not to be liable for any obligations these enterprises might undertake. The Ministry of Foreign Trade, by Resolution No. 1, dated March 1, 1961, created Empresa Cubana de Exportaciones (Cuban Enterprise for Exports), which was empowered to conduct all commercial export operations of the nation formerly conducted by Bancec—"remaining subrogated in the rights and obligations of said bank (Bancec) as regards the commercial export activities." This particular assignment or delegation must be regarded as irrelevant because the sugar, which is the subject of this lawsuit, had already been delivered, and at the time of the Resolution, had become transformed into a debt.

Thereafter, by Resolution No. 102 issued by the Ministry of Foreign Trade on December 29, 1961, Empresa Cubana de Exportaciones was dissolved as of December 31, 1961. On January 1, 1962, the same Ministry issued Resolution No. 1 of that year, creating Empresa Cubana Exportadora de Azucar y sus Derivados, referred to at trial and hereinafter as "Cuba Zucar." It succeeded to the rights and obligations of Bancec relating to foreign commerce in sugar and its derivatives.

By motion docketed in this litigation on May 2, 1975, plaintiff moved for an order pursuant to Rule 25, F.R.Civ.P.,

substituting Empresa Cubana Exportadora de Azucar y sus Derivados (Cuba Zucar) as the plaintiff herein. In opposition to that motion defendant argued that despite the provisions of the various laws and resolutions having to do with the devolution of the claim, which Citibank regarded as self-serving, the subsequent agencies could not be insulated from the counter-claims of defendant against the Cuban Government, and that none of the subsequent agencies could take any more or obtain any better title than its predecessors, the Ministry of Foreign Trade of the Republic of Cuba, or Bancec. As background for the May 2, 1975 motion, the parties had previously stipulated that the Republic of Cuba itself should be substituted as a plaintiff, and should serve an amended complaint. A stipulation to that effect was marked "SO ORDERED" on July 6, 1961. This stipulation, docketed July 7, 1961, authorized the "supplemental complaint in the form annexed," but no such supplemental complaint was apparently annexed or submitted to the Court. No such amended complaint was ever served and filed, and no formal substitution of the Republic of Cuba took place.

By a memorandum decision docketed August 4, 1975, Judge Bryan denied the motion to substitute Cuba Zucar, pointing out that substitution of parties under Rule 25(c), F.R.Civ.P. lies "in the sound discretion of the court."

VII

Real Party in Interest

These occurrences naturally inject a question of "real party in interest" into the discussion of Bancec's claim. The Court perceives no significance or validity to any arguments based on that concept. Bancec and its successors in interest are to be equated with the Cuban Government. Bancec was created by the Government to engage in a state function. All of its capital was contributed by the Govern-

ment, and it had no function to fulfill, except to manage the export of commodities for the account of the Government. Thereafter, the devolution of the claim, however viewed, brings it into the hands of the Ministry, or Banco Nacional, each an *alter ego* of the Cuban Government. For our purposes we accept the present contention of plaintiff's counsel that the order of this Court of July 6th permitting, but apparently not requiring, the service of an amended complaint in which the Republic of Cuba itself would appear as a party plaintiff in lieu of Bancec was based on counsel's erroneous assumption, or an erroneous interpretation of the laws and resolutions providing for the devolution of the assets of Bancec. Assuming this to be true, it is of no moment. The Ministry of Foreign Trade is no different than the Government of which its minister is a member.

Citibank also argues as an alternate theory, that Banco Nacional is the real party in interest here because the draft against the letter of credit was deposited with Banco Nacional as an agent for collection (¶ 7 of Court's Ex. 1, Stipulation). Banco Nacional made demand on Citibank in New York for payment in dollars and under prevailing local banking practice, would be required to and would, account in Havana to Bancec for the proceeds in Cuban pesos. Citibank argues therefrom in effect, that it honored the draft in favor of Banco Nacional, and instead of remitting the funds to Banco Nacional, set-off its claims against Banco Nacional against the funds which it had become obligated to pay, not Bancec, but Banco Nacional. This analysis, if accepted, would place Bancec in the status of a beneficiary of a promise by Citibank to pay Banco Nacional, and thereby subject it to the defenses and set-offs existing in favor of Citibank against Banco Nacional.

The Court rejects as invalid this alternate theory of set-off as between banks. The relationships here are regulated by § 350-a, *et seq.* of the New York Negotiable Instruments Law, since repealed effective September 27, 1964, as to

transactions occurring after that date, upon adoption of the Uniform Commercial Code. That section provided in relevant part:

> § 350-a. Bank as agent for collection.
>
> Except as otherwise provided by agreement and except as to subsequent holders of a negotiable instrument payable to bearer or indorsed specially or in blank, where an item is deposited or received for collection, the bank of deposit shall be agent of the depositor for its collection and each subsequent collecting bank shall be sub-agent of the depositor but shall be authorized to follow the instructions of its immediate forwarding bank and any credit given by any such agent or sub-agent bank therefor shall be revocable until such time as the proceeds are received in actual money or an unconditional credit given on the books of another bank, *which such agent has requested or accepted.* Where any such bank allows any revocable credit for an item to be withdrawn, such agency relation shall nevertheless continue except the banks shall have all the rights of an owner thereof against prior and subsequent parties to the extent of the amount withdrawn." [Emphasis added]

This section, adopted in 1929, was declaratory of prior New York law, at least as to the point under consideration. *McBride* v. *The Farmers Bank of Salem, Ohio,* 26 N.Y. 450, 454 (1863) and prior New York cases cited therein, reached this result on reasoning that the collecting bank was not a *bona fide* holder in due course for value, because antecedent debt is not such a consideration. On this actual point hung the dispute between New York State courts and the Supreme Court following the decision in *Swift v. Tyson,* 41 U.S. (16 Pet.) 1, 10 L.Ed. 865 (1842) overruled in *Erie R. R.* v. *Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). *Compare, The Bank of the Metropolis*

v. *The New England Bank*, 42 U.S. (1 How.) 234, 11 L.Ed. 115 (1843) permitting set-off by a collecting bank as sought herein. In a pre-*Erie* case, *Carnegie Trust Co.* v. *First Nat. Bank of the City of New York*, 213 N.Y. 301, 304 (1915) the New York Court of Appeals (per Cardozo, J.) assumed, but found it unnecessary to hold, that a collecting bank had the right before it made remittance to apply the collections against its deposit with the plaintiff bank of deposit. The Court suggested that the issue would turn on "the relation between the [collecting] bank and the plaintiff," which it characterized as "obscure." The Court noted that if the bank held the drafts for collection only, as trustee or agent for the depositor, "the rules of equitable set-off do not permit a trustee or agent to apply a claim in his own right in cancellation of his liability as a fiduciary," citing *Morris* v. *Windsor Trust Co.*, 213 N.Y. 27, 106 N.E. 753 (1914).

Thereafter, in *Dakin* v. *Bayly*, 290 U.S. 143, 54 S.Ct. 113, 78 L.Ed. 229 (1933), the Supreme Court, in a case involving a Florida statutory scheme similar to § 350, *et seq.* of the New York NIL, distinguished *Bank of the Metropolis, supra*, and held that in light of the agency relationship existing between the depositor and forwarding bank, no set-off could be permitted in favor of the collecting bank for lack of mutuality. The Supreme Court held (p. 146 of 290 U.S., 54 S.Ct. at 114) "a defendant sued upon his individual debt may not avail himself for this purpose of a demand against the plaintiff held in a fiduciary capacity." (Citations omitted).

To the same effect is the holding in *Friedman* v. *Irving Trust Co.*, 164 Misc. 811, 300 N.Y.S. 51 (Mun.Ct.N.Y.C. 1937) applying New York law. There, the Court held:

> "The Huguenot Bank [depositary bank] acted only as plaintiff's collecting agent; the defendant, as subagent. The credit given by defendant to the Huguenot

Bank was given after the suspension of the Huguenot Bank.... While the defendant claims it paid the proceeds of these checks to the Huguenot Bank, the actual fact is that the so-called 'payment' was nothing more than a mere accounting item on its books after the suspension of the depositing bank; this so-called 'payment' was neither a payment in currency nor an 'unconditional credit' of a character recognized in law (see sections 350-a, and 350-1, Negotiable Instruments Law) and, if anything, it would appear that what the defendant did do, in effect, was to reduce on its own books an indebtedness due to it from the Huguenot Bank.

* * * *

By the express terms of section 350-a of the Negotiable Instruments Law, defendant was the subagent of the plaintiff; the funds in question, upon collection by the defendant, were a trust fund for the benefit of the plaintiff."

Within § 350-a of the New York NIL, Bancec has never received the proceeds of the sight draft in "actual money." There is no showing that it ever received an "unconditional credit." In *In re Bank of United States,* 243 App. Div. 287, 277 N.Y.S. 96 (1st Dept. 1935) it was held that:

"The term 'unconditional credit,' although frequently recurring, is nowhere defined throughout article 19-A of the Negotiable Instruments Law (section 350, *et seq.*). That article, commonly known as the Bank Collection Code, in many respects has revolutionized the ancient principles pertaining to the collection of commercial paper by banks. ... Construing together all the provisions of that article, the term 'unconditional credit' can only mean a credit which may not be withdrawn, even if it is eventually found that the item for which it

is given is not collectible. It imports a credit which is not 'revocable' under section 350-a, nor 'provisional' under section 350-b."

Recently in *Fuller* v. *Fasig-Tipton Co.*, 587 F.2d 103, 106 (2d Cir. 1978), the Court of Appeals held that "one dealing with an agent for a disclosed principal may not set-off the agent's personal indebtedness against amounts due the principal." The stipulated facts, while showing that the draft was deposited by Banco Nacional for collection, does not state whether the agency relationship was known to Citibank. Probably such knowledge can be inferred from all the facts, but if not, Citibank was aware of the statutory presumption and had no factual knowledge indicating otherwise. Accordingly, Citibank here cannot discharge its obligation to Bancec by setting-off against Bancec the indebtedness to it of Banco Nacional as collecting or depositary bank with respect to the sight draft which is the subject of plaintiff's claim.

Rather, the Court will look to the realities of the situation, which justify regarding Bancec and its successors in interest the same as Banco Nacional or the Cuban Government for these purposes, in accordance with the rule of *Banco I, Sabbatino* and *Farr,* discussed *supra,* pp. 418-419.

No factual or legal basis is perceived to distinguish between the one Government wholly owned bank, Banco Nacional, on the one hand, and the other Government wholly owned bank, Bancec, on the other hand. The law creating Bancec describes it as "an official, autonomous, credit institution for foreign trade with full juridical capacity and capital of its own." This view of Bancec is not controlling on the Court. Under all of the relevant circumstances shown in this record, including the Stipulated Facts, it is clear that Bancec lacked an independent existence, and was a mere arm of the Cuban Government, performing a purely governmental function. The control of Bancec was exclusively in the hands of the Government, and Bancec was

established solely to further Governmental purposes. Moreover, Bancec was totally dependent on the Government for financing and required to remit all of its profits to the Government.

While analogy to American institutions is of slight value, Bancec's complete financial dependence on the Cuban Government distinguished its situation from that of the Tennessee Valley Authority ("TVA"), regarded by plaintiff as being analogous to itself. The TVA has far greater financial independence, including the authority to issue bonds to finance its projects, subject only to prior approval of the Secretary of the Treasury, and less direct government control of its management, 16 U.S.C. § 831n-1-n-4. Bancec, in its relationship to the Government, seems closer to the now defunct Reconstruction Finance Corporation ("RFC") and its subsidiaries, which on numerous occasions were held to be an agent or arm of the United States Government, and shared in the privileges, responsibilities and immunities of that Government. See, *e. g., Keifer & Keifer* v. *RFC,* 306 U.S. 381, 59 S.Ct. 516, 83 L.Ed. 784 (1939). Of course cases involving American governmental agencies are of slight value as precedent here; at most they support an *a fortiori* argument.

Also of slight weight are reported cases in American courts decided before January 21, 1977 involving agencies and instrumentalities of foreign countries, most of which have been resolved factually according to the degree of independence of the corporate entity. *United States* v. *Deutsches Kalisyndikak Gesellschaft,* 31 F.2d 199 (S.D.N.Y. 1929); *Coale* v. *Societe Co-Operative Suisse Des Charbons, Basle,* 21 F.2d 180 (S.D.N.Y. 1921); *Ulen & Co.* v. *Bank Gospodarstwa Krajowego,* 261 App.Div. 1, 24 N.Y.S.2d 201 (1940) . Also inapposite are cases in which private corporations were continued to be treated as such, notwithstanding acquisition by government of stock ownership of those corporations. See, *e.g., Bank of the United States* v. *Plan-*

ters' Bank of Georgia, 22 U.S. 904, 9 Wheat. 904, 6 L.Ed. 244 (1824); *Ballaine* v. *Alaska Northern Ry. Co.,* 259 F. 183 (9th Cir. 1919); *Panama R. Co.* v. *Curran,* 256 F. 768 (5th Cir. 1919).

Cases decided under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-11, *e.g., Yessenin-Volpin* v. *Novosti Press Agency,* 443, F.Supp. 849 (S.D.N.Y. 1978); *Edlow International Co.* v. *Nuklerna Elektrarna Krsko,* 441 F.Supp. 827 (D.D.C. 1977), provide support for our conclusion that Bancec is an instrumentality of the Cuban Government for purposes of this case. Bancec is not a mere private corporation, the stock of which is owned by the Cuban Government, but an agency of the Cuban Government in the conduct of the sort of matters which even in a country characterized by private capitalism, tend to be supervised and managed by Government. Where the equities are so strong in favor of the counter-claiming defendants, as they are in this case, the Court should recognize the practicalities of the transactions. Doing justice in the case should not be obfuscated or side-tracked by self-serving recitals in post-revolutionary statutes of the Cuban Government, undoubtedly drawn with litigation of this sort in mind. The Court concludes that Bancec is an *alter ego* of the Cuban Government.

Chase admits that it is indebted to Banco Nacional in the amount of $9,793,021.70, except to the extent that it is entitled to assert set-offs, in reduction of that amount. Citibank concedes and admits that it is indebted either to the Cuban Government, Bancec, the Ministry of Foreign Trade, Banco Nacional, Empresa Cubana de Exportaciones, or Cuba Zucar in the amount of $193,280.30, as a result of an accepted draft against its letter of credit to Bancec referred to above. This concession also is subject to the right of set-off.

* * * *

VIII

Legal Basis for the Counterclaims

The set-offs pleaded here arise generally out of the nationalization of the branch banks of Chase and Citibank in Cuba. On September 16, 1960, Citibank maintained eleven branch offices in Cuba, and Chase had four such branches. The organization and nature of the branches is described in greater detail below. Citibank had been engaged continuously in branch banking in Cuba since 1915 and Chase had been so engaged since 1925.

* * * *

With respect to all of their claims, Chase and Citibank each recognize that they cannot proceed affirmatively against plaintiffs in this action, or the Government of Cuba, but are at most entitled to a full set-off. See *National City Bank* v. *Republic of China,* 348 U.S. 356, 75 S.Ct. 423, 99 L.Ed. 389 (1955); 28 U.S.C. § 1607(c).

* * * *

Insofar as the Chase branch banks are concerned, the liability theory asserted by Chase in this litigation has already been validated in the companion Citibank litigation. See *Banco I,* 270 F.Supp. 1004, 1006, 1010 (S.D.N.Y. 1967), *on remand,* 478 F.2d 191, 193-94 (2d Cir. 1973). See also, *National City Bank* v. *Republic of China,* 348 U.S. 356, 75 S.Ct. 423, 99 L.Ed. 389 (1955). For the reasons stated in *Banco I,* Chase can set-off the full value of its branches and their assets in this lawsuit, and little purpose will be served in a further or additional analysis of the law concerning that liability. The Court recognizes that plaintiffs, which have briefed the issue comprehensively, seek to relitigate the correctness of *Banco I,* and they in turn recognize that this Court at trial level is precluded by the prior appellate pronouncements affirming in substantial part the decision of Judge Bryan in *Banco I.*

Basically that litigation stands for the purpose that Banco Nacional and the Government of Cuba are and were one and the same for all purposes of the litigation of this type of claim; and that in a suit by a foreign sovereign in our courts, the sovereign immunity doctrine does not bar a set-off up to the amount recovered by the foreign sovereign (see *National City Bank* v. *Republic of China, supra,* and cases cited in *Banco I,* 270 F.Supp. at 1006, 1007. Also, *Banco I* stands for the point that a claim of set-off is not barred under the circumstances of this case by the Act of State doctrine as enunciated in *Banco Nacional* v. *Sabbatino,* 376 U.S. 398, 84 S. Ct. 923, 11 L.Ed.2d 804 (1964), because the set-off is authorized by the so-called Hickenlooper or Sabbatino Amendment to the Foreign Assistance Act of 1964, 22 U.S.C. § 2370(a)(2), as amended, 79 Stat. 658-59.

It is also a foreclosed issue that the taking of Citibank's Cuban branches by the Government of Cuba was in violation of international law because (a) Cuba failed to provide compensation for the taking; (b) the taking was a retaliatory measure against the United States citizens because of their Government's actions with respect to the Cuban sugar quota; and (c) the taking discriminated against American nationals in that Cuban owned, as well as Canadian and French private banks were not acquired by the Cuban State until much later.

In connection with our discussion of Act of State, it must be observed that Chase and Citibank each have a "*Bernstein* letter" from the Office of the Secretary of State of the United States. *Bernstein* v. *N. V. Nederlandsche,* 210 F.2d 375 (2d Cir. 1954). The 5–4 decision of the Supreme Court at 406 U.S. 759, 92 S.Ct. 1808, 32 L.Ed.2d 466 (1972) in *Banco I* must be read to hold that the Act of State doctrine does not bar consideration of Citibank's off-set up to the amount of Banco Nacional's claim against

Citibank. That conclusion applies with equal vigor to Chase's offsets here pleaded.

The plurality opinions in *Banco I* each found a different factor determinative of the question of when and under what circumstances the courts of this country may examine the legality of expropriations within its boundaries by a foreign government of property of American citizens. At least it may be inferred from *Banco I* that the *Bernstein* exception to the Act of State doctrine is regarded by Chief Justice Burger and Justices Rhenquist and White as having continued vitality. In the view of Justice Douglas, a foreign sovereign which brings suit in American courts waives its defense of sovereign immunity, and *pro tanto* waives the Act of State doctrine defense, insofar as concerns counterclaims up to the amount of the claim which the foreign sovereign asserts. This view is apparently codified in 28 U.S.C. § 1607(c). The Foreign Sovereign Immunities Act of 1976 was regarded by the court in *Yessenin-Volpin* v. *Novosti Press Agency*, 443 F.Supp. 849, 851 (S.D.N.Y. 1978) as retrospective, and applicable to cases undecided on January 21, 1977. The Department of State has expressed the same view. See fn. 1 in *Yessenin-Volpin, supra. Banco I* suggests Justice Powell believes that the doctrine of the *Bernstein* letter exception implies a violation of the separation of powers, although he agreed that the Act of State doctrine should not apply to the facts of *Banco I.*

After deciding only the inapplicability of the Act of State doctrine, or alternatively the effectiveness of the *Bernstein* letter, the Supreme Court remanded *Banco I* to the Court of Appeals for the second time "for consideration of [Banco Nacional's] alternative bases of attack on the judgment of the district court." 406 U.S. at 770, 92 S.Ct. at 1814. Thereafter, the Court of Appeals unanimously affirmed the holding of the district court that Citibank was amount as was due and owing from the Cuban Government entitled to set-off, against Banco Nacional's claim, such

as compensation for the seizure of Citibank's Cuban properties which had devolved into the ownership and control of Banco Nacional [478 F.2d 191 (1973)]. The opinion of Judge Hays in that regard may be held to constitute a holding that Banco Nacional and the Government of Cuba had acted as a single entity in the expropriation of Citibank's Cuban property and were one and the same for purposes of that litigation. It further held that the expropriations of the Citibank Cuban properties by Cuba and Banco Nacional violated international law, citing *Banco Nacional de Cuba* v. *Sabbatino,* 307 F.2d 845 (2d Cir 1962), *rev'd. on other grounds,* 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) and *Banco Nacional de Cuba* v. *Farr,* 383 F.2d 166 (2d Cir. 1967), *cert. denied* 390 U.S. 956, 88 S.Ct. 1038, 20 L.Ed.2d 1151 (1968).

There is no reason why the Court should hold otherwise in the case of Chase's branches, and this Court regards these issues as having been conclusively decided. We note in passing that the point of *Banco I,* that a counterclaim by way of set-off, limited to the amount of a foreign state's principal claim as plaintiff, is not barred by the Act of State doctrine or by sovereign immunity, has been reaffirmed by the majority, concurring and dissenting opinions in *Alfred Dunhill of London, Inc.* v. *Republic of Cuba,* 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976).

In sum, it follows from the foregoing that under international law Chase is entitled to compensation for its Cuban branches confiscated. Apart from the *stare decisis* effect of *Banco I* available to Chase here, it is to be noted that Professor Lillich in his authoritative work entitled *The Valuation of Nationalized Property in International Law* (1973), Vol. 2 at p. 121, n. 6, has written:

> "The Cuban nationalizations 'based upon a totally illusory funding system and payable in bonds that were never printed' so patently violated international law that serious analysis was unnecessary."

As was also observed by the late Judge Bryan in *Banco I* (270 F.Supp. 1008-10), the acts of the Cuban Government exhibited the same retaliatory, discriminatory character as the measure condemned as violative of international law by the Court of Appeals in *Sabbatino, supra,* 307 F.2d at 345, 865.

* * * *

CONCLUSION

The foregoing, to the extent appropriate, may be regarded as findings of fact and conclusions of law.

* * * *

APPENDIX C

Order On Rehearing From the United States Court of Appeals For the Second Circuit

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UNITED STATES COURT OF APPEALS
For The Second Circuit

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the thirteenth day of October, one thousand nine hundred and eighty-one.

Banco Para El Comercio Exterior De Cuba, *Plaintiff-Appellant,* v. First National City Bank, *Defendant-Appellee,*	No. 80-7297

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellee, First National City Bank,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO

A. DANIEL FUSARO, *Clerk*

by FRANCES X. GENDHART
Chief Deputy Clerk

APPENDIX D

CUBAN STATUTES*

1. Law No. 793 (Articles 1 and 2)

MINISTRY OF THE TREASURY

I, OSVALDO DORTICOS TORRADO, President of the Republic of Cuba, do hereby make known that the following law has been enacted by the Council of Ministers and approved by me:

WHEREAS: The reorganization of the credit institutions of the State undertaken by the Revolutionary Government for the purpose of effectively serving the broad program of agricultural and industrial development of the nation, cannot be limited merely to those strictly concerning the internal production operations but must also consider the proper articulation of the State credit institution that has charge of the external banking and financial relations that make possible and facilitate an increase in the buyer markets of Cuban production and at the same time assure imports of the raw materials and equipment that they require and the consumer goods that cannot be produced in this country.

WHEREAS: For this purpose it is necessary to found a State banking organization with adequate autonomy and soundness, vested with sufficient power to meet the various contingencies of international trade and that it may have a well trained management for the needs of the national economy in the process of expansion as well as of the projects and plans prepared by the Government to fulfil and overcome them.

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* The translations of Cuban Statutes in this Appendix were furnished by counsel for Cuba in the course of this and related litigation.

WHEREAS: By Law-Decree No. 1425 of May 12, 1954 the overthrown regime created the bank entitled Cuban Foreign Trade Bank with a capital of $3,500,000.00 which the State subscribed and paid for with the authorization of increasing said capital by $3,000,000.00 which should be subscribed by the banks members of the "Banco Nacional de Cuba" in the sum of $1,000,000.00 and by export industrial or agricultural merchants and producers in the sum of $2,000,000.00, none of which private subscription was ever effected.

WHEREAS: Inasmuch as the State is the only participant in the capital of said bank, as was provided in the second paragraph of Article 16 of said dictatorial Law-Decree, the statutory functions of the stockholders and of the Board of Directors of the Bank have been handled by the Board of Directors of the "Banco Nacional de Cuba", the former having become a department of the Central Bank with a probable decrease in the capacity for initiative and services it not being advisable that said structure be maintained.

NOW, THEREFORE: In pursuance of the powers vested in it, the Council of Ministers has resolved to enact the following

Law No. 793

Article 1. An official autonomous credit institution for foreign trade is hereby founded and established under the name of "Bank of Foreign Trade of Cuba" with full juridical capacity and capital of its own, which shall be governed by the following

BY-LAWS

No. I—*Name.* The name of the Institution is Cuban Foreign Trade Bank (BANCO PARA EL COMERCIO EXTERIOR DE CUBA); however it may be officially

identified by the initials BANCEC. No other national or foreign commercial or credit institution may operate in Cuba using a like or similar name or initials which may lead to confusion. The "Banco Nacional de Cuba" is hereby authorized to suspend the operation of any company or concern that uses ambiguous initials or name until such interference is corrected.

No. II—*Domicile.* The central office of the Bank will be located in the capital of the Republic, at the place designated by its Governing Council but the institution may open agencies or branches abroad and may establish affiliated banking organizations subject to the legislation of the respective country.

No. III—*Duration.* Tb· Bank is organized for an indefinite period of time counted from ten days following the publication of this law in the Official Gazette. It shall have juridical existence until it is liquidated, without the need of a formal registration or recording in any Registry in Cuba, in view of its status of public institution. In its foreign activities the respective local legislations will be observed.

No. IV—*Capital.* The capital of the Bank shall be Six Millions Pesos ($6,000,000.00); however, it may be increased by a national law.

The Cuban State shall subscribe and pay this capital as hereinafter provided in this law.

No. V—*Profits and Reserves.* Every six months a balance shall be taken as of the close of operations on June 30 and December 31 of each year. The profits shown thereby shall be considered as fiscal revenue and shall be deposited in the General Treasury of the Republic after deducting only such amounts as the Governing Council may set aside for capital reserves of the Bank, in the measure that they

be essential for the proper operation of the Cuban Foreign Trade Bank.

No. VI—*Auditor.* The Auditor of the Bank shall be appointed by the Governing Council, under which he shall serve.

No. VII—*Inspection.* The BANCEC shall also be subject to inspection by the "Banco Nacional de Cuba" and the Board of Accounts.

No. VIII—*Purpose and Powers.* The Cuban Foreign Trade Bank is an organization designed to contribute to, and collaborate with, the international trade policy of the Government and the application of the measures concerning foreign trade adopted by the "Banco Nacional de Cuba".

In accordance with the such purposes the Bank shall:

a) Contribute to the equilibrium of the balance of payments in line with the accelerated economic development of the country;

b) Increase exports without affecting national supplies of raw materials and essential articles, and develop production of exportable goods the prices and demand of which may be convenient to the international market;

c) Promote exports of products that contain the maximum degree of manufacture;

d) Recommend that the exports of scarce and non renewable resources be prevented or limited;

e) Effect exports and imports in accordance with the volume, quality, price, origin or destination most convenient to the interests of the country;

f) Contribute to the greatest use of available foreign exchange and to the rational use of Cuba's foreign

credit without compromising inconveniently the country's capacity for payment;

g) See to the better specifications of quality and other standards that will govern our export and import trade;

h) Act as the sole exporter and importer of products or regions when so advised by reasons of national convenience;

i) Contribute to the coordination of the foreign trade policy with the policy of economic development;

j) Promote a diversification of foreign markets and of products for a progressive and sound development of the Cuban foreign trade;

k) Improve, promote, stimulate, assure, orient and develop the foreign trade of Cuba, consolidating and opening markets for Cuban production directly or through third parties, and acquiring or facilitating the acquisition of such foreign products as may be necessary or convenient for the supply and expansion of the national economy.

No. IX—*Operations.* In order to fulfil the objectives mentioned in the preceding section the Cuban Foreign Trade Bank may:

a) Collaborate with its technical and financial assistance to make feasible in foreign markets the plans adopted by the Revolutionary Government or the "Banco Nacional de Cuba" for the expansion of commercial interchange or directly to carry forward the pertinent operations.

b) To buy in the country and sell abroad all kinds of national agricultural, industrial or mining products, for cash or on instalments, to finance and grant loans and advances to national concerns or organizations that produce or may produce for foreign markets or which should place their surplus production therein.

c) To purchase all kinds of products in foreign markets and sell them in the country directly or through its own agencies or concerns in which it may participate, or even through commission merchants, acting in their own name or in the name of others, that it may appoint; make such exports and imports as the Government may decide to carry on an exclusive basis.

d) Study, promote and engage in exchange or compensation operations considered feasible or convenient, whether it be in an effort to obtain markets for exportable surpluses that are hard to sell abroad, or for other causes.

e) Create affiliated companies abroad as well as to participate in the capital of other concerns that are engaged, within or without the national territory in the import trade of raw materials, equipment and machinery or merchandise of popular consumption when thus recommended by the Government, or in the exportation or transformation or use of Cuban products, or in the high seas carriage of Cuban or foreign merchandise intended for the national market.

f) Grant credits or make investments for the development of the foreign trade of the nation, the production of exportable goods or goods the importation of which may be detrimental to the national economy, and, in general, to engage in all manner of active banking operations.

g) Receive sight or time deposits, accept documents for its own account or for account of third parties, borrow money on loan from public or private banks and from national or foreign private individuals, and, in general, engage in all sorts of passive banking operations.

h) Buy, sell, pledge or encumber in any legal way, real estate, precious stones or metals, whether or not

coinable, foreign coins and exchange, credits, rights, commercial paper, bonds, stocks, debentures and public or private securities, in Cuban or foreign currency.

i) Buy, sell, lease or take in leasehold, mortgage or accept mortgages and discharge them, or otherwise lawfully dispose of real property or personal property considered as realty under other legislations, such as vessels and floating dry docks or other similar facilities.

j) Issue and place bonds, debentures, titles, certificates of participation or other securities negotiable on the Stock Exchange, with the generic security of the assets of the Bank or the specific security of certain credits, paper, securities, properties, business, concessions or rights, or any participation therein, or the Bank's interests in specific concerns, and to call in such securities, resell, pledge or accept them as security or in payment of loans and obligations.

k) Grant credits in transactions with countries with non-convertible currencies, within the amount of the advances that may be granted it for that purpose by the "Banco Nacional de Cuba".

l) To open and close current accounts or other monetary deposits in national currency or foreign exchange at the "Banco Nacional de Cuba" or in foreign banks, within or without the national territory; place monetary funds or securities on special deposit or guarantee, provide sureties or guarantees for its own obligations or those of others, without mortgage security or with the pledge of credits, commercial paper, merchandise, rights, or other assets, or on mortgage if the property is real property; and to accept balances, funds or securities of other national or foreign banks, within or without the nation, surety bonds, properties or personal or guarantees in rem with which obligations and commitments are insured.

m) Discount and rediscount at the "Banco Nacional de Cuba" and obtain from it advances with the specific guarantee of eligible documents with the generic security of its portfolio, or with sufficient guarantee of products. The credit policy with the Cuban Foreign Trade Bank may be decided upon by the "Banco Nacional de Cuba" on the vote of three State directors of its Board of Directors.

n) Draw, endorse, accept or guarantee bills of exchange, drafts, checks, promissory notes to order or other commercial paper; to negotiate and issue letters of credit whether confirmable or not, and sign all manner of public or private contracts covering the loans that it receives or other indebtedness, obligations or active or passive commitments.

ñ) To engage in any activity of international trade, involving credit or finances compatible with its objectives and functions, even though not expressed in the preceding sections.

o) To decide upon its bugets and plans for investment and operations.

No. X—*Government and Management.* The Bank shall be governed and managed by its Governing Board and its General Manager.

No. XI—*The Governing Board.* The Governing Board is the supreme body of the Bank and is vested with the broadest powers to dispose of its personal and real properties, and to authorize and provide those that are assigned by these By-laws to other administrative organs; and it shall be presided ex-officio by the President of the "Banco Nacional de Cuba" and shall be composed of a Delegate of the Minister of Commerce, a Delegate of the Minister of Economy, a Delegate of the National Agrarian Reform

Institute (INRA) and a Delegate of the Department of Mines and Petroleum of the Ministry of Agriculture.

The Governing Board shall:

1. Resolve on the credit policy to be followed by the Bank in foreign markets.

2. Resolve on the policy of purchases and sales and establish the quantitative, generic or specific limitations that the General Manager should adhere to according to the nature of the transactions and in view of the nature of the products and the orientation or regional source of the trade.

3. Decide upon or, in lieu thereof, approve or change the budgets and the investment plans and operations prepared by the General Manager.

4. Apply to the "Banco Nacional de Cuba" for lines of credit and global advances for the operations of the Bank.

5. Appoint, remove and replace the General Manager. The appointment may be for an indefinite or a fixed period of time.

6. Appoint and remove the Secretary of the Bank who, shall also be the Secretary of the Governing Board.

7. Appoint and remove the Auditor who is to audit the accounting.

8. To hold a regular meeting once a month and special meetings whenever requested by the President of the Governing Board on his own initiative or at the suggestion of the General Manager.

9. To request the General Manager to take the final cognizance and decision of any matter which, due to its importance or amount requires the intervention of the Board.

10. To establish the limits of the jurisdiction of the General Manager as well as regarding the use of the bank's signature by the officers.

11. To decide the consultations of the General Manager.

12. To approve the issues of quotable securities and paper.

13. To decide on the appeals that affected parties may establish against decisions of the General Manager.

14. To approve the internal regulations issued by the General Manager.

15. To approve the semi-annual balance sheet and if necessary to order the setting up of reserves on account of profits.

16. To decide on all matters provided in the objectives of the Bank when not done by the General Manager or does not fall within his jurisdiction.

17. To meet as a Liquidation Board in the event of the liquidation of the Bank and to place at the disposal of the State any active balance resulting after the liabilities have been paid.

No. XII—*Quorum and Majority.* The regular and special meetings will require a quorum of three members of the Board and resolutions shall be adopted in all cases by at least three affirmative votes.

No. XIII—*The Members of the Board.* The members of the Board shall not have direct administrative functions in the business of the Bank, except to act on the Board by means of resolutions. Exception is made of the President who may have the initiative in all matters under the terms of this Organic Statute and shall decide whether to sign

or subscribe to the minutes or documents, public or private, in the name of the Bank, that contain negotiations of public or economic importance.

No. XIV—*The President.* The President of the Board who shall also be the President of the Bank, shall be the social and legal representative of the Bank, and shall discharge these duties continuously and lawfully through the General Manager, except in the event that he should reserve to himself specifically the personal exercise of said functions. He shall have the following powers:

a) Call and preside over the meetings of the Governing Board.

b) Authorize the certificates issued by the Secretary regarding resolutions and minutes of the Board, by his attestation.

c) Appoint the member who is to take his place as President at the meetings of the Board in cases of absence or disability.

d) Through the General Manager to supervise the organization and operation of the Bank's offices.

No. XV—*The Secretary.* The Secretary shall be appointed by the Governing Board and his position shall be one of trust, and it shall be his duty:

a) Issue the notices for the regular and special meetings of the Governing Board, attending the meetings without any voting right.

b) Draw up the minutes of the meetings, enter them in the respective books and to have the custody thereof, carefully keeping them.

c) Issue certificates regarding the resolutions adopted by the Board, with the attestation of the President.

d) To advise the Board on legal matters as counsel of the Board.

e) Direct the legal department which is to assist him in matters regarding the various departments and offices of the Bank.

No. XVI—*The General Manager.* The General Manager is, as regards third persons, the official representative of the Bank by legal delegation of the President, except in cases where the President reserves the decision on matters for himself. He shall preside over the Advisory Administrative Committee which will function regularly for the proper handling of the operations of the Bank and shall be composed of the Managers of the Bank and other officers designated by the Governing Board and shall directly manage all matters, business and offices of the Bank. He shall sign, together with another authorized officer, the contracts and obligations that may be entered into by the Bank, whenever the Governing Board has not appointed express representatives for that purpose. In case of absence or impediment he shall be substituted by the Manager appointed by the Governing Board. He may be appointed for an indefinite period of time subject to revocation by the Board or under a temporary service contract. The General Manager shall also:

a) Decide upon all operations and business included among the objects of the Bank within the quantitative or other limitations that may be imposed by the Board, admitting or giving the personal or in rem guarantees provided by this law and fully binding the institution in all cases in which the Board has not reserved the matter for its own decision.

b) Organize the banking offices in accordance with the instructions given by the Board, appointing the trained personnel required to serve them, on the basis of preparation and training. In the case of the ap-

pointments of Managers and other officers having great responsibility within the Bank, they shall be made with the knowledge and approval of the President of the Bank.

c) To decide upon and submit to the Board regulations for the general operations or for special services.

d) Decide upon powers of attorney for litigation or for business, appointing the attorneys in fact and revoking such appointments, all in accordance with the President.

e) Authorize and revoke the use of the Bank signature by the officers, requiring the concurrence of the signature of two of them in all cases in accordance with the principle of double control, according to their respective rank in relation to the amount of the business, in order to bind the institution.

f) To prepare the operating and investment budgets, submitting them to approval by the Board.

g) To present statements and balance sheets of the operations of the Bank to the Board, from time to time.

h) To submit initiatives and consultations to the decision of the Board and keep it regularly and properly informed, as well as the President, of the activities of the Bank and of its important operations.

i) Fulfil and see to the fulfilment of the By-laws and Regulations of the Bank and the resolutions of the Board.

No. XVII—*The Managers.* The Managers shall be at the head of the principal departments of the Bank. They may use the signature together with another authorized officer in business transactions ordered by the General Manager. One of them shall be the alternate of the General Manager, on appointment by the Board.

No. XVIII—The other officers and employees of the Bank shall be appointed by the General Manager acting in conformity with the President, following the standards that the latter may establish, with the approval of the Governing Board.

Article 2. Commencing on the effective date of this law the purchases abroad of equipment, machinery, raw materials or merchandise of all kinds contract for by the State, the autonomous organizations or other offices of the State, the provinces or the municipalities as well as their banking, financial and exchange operations shall be handled exclusively by and through the Cuban Foreign Trade Bank which, in the future, shall act as the central import office of the State, of the autonomous organizations and of other State, provincial or municipal offices.

In qualified cases and when thus required by national interest some imports may be excluded from the provisions of this Article, provided it is expressly decided by the Council of Ministers.

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2. Law No. 930 (Excerpted)

EXECUTIVE POWER

COUNCIL OF MINISTERS

I, Osvaldo Dorticós Torrado, President of the Republic of Cuba, do hereby make known that the Council of Ministers has enacted and I have approved the following law:

Whereas, the measures adopted by the Revolutionary Government in pursuance of the Program of the Revolution have resulted, within a short time, in profound social changes and considerable institutional transformations of the national economy.

WHEREAS, among these institutional transformations there is one which is specially significant due to its transcendence in the economic and financial fields, which is the nationalization of the banks ordered by Law No. 891, of October 13, 1960, by virtue of which the banking functions will hereafter be the exclusive province of the Cuban Government.

WHEREAS, the consolidation and the operation of the economic and social conquests of the Revolution require the restructuration into a sole and centralized banking system, operated by the State, constituted by the National Bank of Cuba, which will foster the development and stimulation of all the productive activities of the Nation through the accumulation of the financial resources thereof, and their most economic and reasonable utilization.

NOW, THEREFORE: In pursuance of the powers vested in it, the Council of Ministers has resolved to enact the following:

Law No. 930

THE NATIONAL BANK OF CUBA

* * * *

SPECIAL PROVISIONS

* * * *

THIRD. The autonomous State credit agency known as the Foreign Trade Bank of Cuba created by Law No. 793, of April 25, 1960, and the Agricultural and Industrial Credits Department of the National Agrarian Reform Institute, to which Law No. 766, of March 24, 1960 and Law No. 847, of June 30 of the same year, refer, are hereby discontinued.

The assets and liabilities of a banking nature of the institutions dissolved by the preceding paragraph are hereby incorporated in the National Bank of Cuba.

The President of the National Bank of Cuba and the Minister of Foreign Trade shall agree upon the distribution of the capital of the former Foreign Trade Bank of Cuba out of which they shall transfer the sum of Four Million Pesos ($4,000,000) to the capital of the National Bank of Cuba, and Two Million Pesos ($2,000,000) to the capital of the foreign trade enterprises or houses of the Ministry of Foreign Trade (sic).

Likewise the President of the National Bank of Cuba and the Minister of Foreign Trade shall agree upon the distribution of the personnel, offices, equipment and dependencies of the former Foreign Trade Bank of Cuba. Taking into account the trade and banking functions heretofore assigned to said Bank, so that the trade functions will be assumed by the foreign trade enterprises or houses of the Ministry of Foreign Trade, and the banking functions will be taken over by the National Bank of Cuba; and are hereby authorized to redistribute, reorganize and readjust said personnel and offices as they may deem best.

FOURTH. The President of the National Bank of Cuba shall submit to the approval of the Executive Power the proposed organic regulations of the Bank.

FIFTH. The National Bank of Cuba as legal successor to said State Banks and to the Agricultural and Industrial Credits Department of the Agrarian Reform Institute, both of which have been dissolved by this Law, as well as to the private banks nationalized in pursuance of Law No. 851 of July 6, 1960 and Law No. 891 of October 13, 1960, and to the banking institutions which the Government has acquired under contracts shall be deemed to be subrogated to all the property, assets, rights and claims, and to be the successor to, all the obligations peculiar to the banking business, of the institutions incorporated, without requiring any formal records, deeds or endorsements to leave due record of the conveyances of property and securities, credits, and

it being unnecessary to enter record of such transfers and conveyance in any register or office of record whatever.

• • • •

3. Law No. 934

EXECUTIVE POWER

COUNCIL OF MINISTERS

I, Osvaldo Dorticós Torrado, President of the Republic of Cuba, do hereby proclaim that the Council of Ministers has enacted and I have approved the following law:

WHEREAS it is a preoccupation of the Revolutionary Government to expand, on a basis of mutual respect and benefit, the relations of economic cooperation with all countries, thereby promoting the stabilization and development of the national economy.

WHEREAS, it is unquestionable that aside from the economic advantages of international cooperation, its development fosters friendship among peoples and the strengthening of pacific coexistence among all the nations of the World, an objective that represents an earnest desire of the Cuban people, and a fundamental postulate of the international policy of the Revolutionary Government.

WHEREAS, the basic export industry of the country having been nationalized, and the State having taken over all import and export trade functions, it is imperative to reorganize the administrative agencies that will attend to the supervision and management of foreign trade activities.

WHEREAS, this administrative organization can be achieved by establishing a Ministry which, through a suitable and reliable centralization, will provide for, plan, and carry on that trade in direct and immediate co-relation with

the economico-political plans of the Revolutionary Government.

Now, Therefore: In pursuance of the powers conferred upon it, the Council of Ministers has resolved to enact the following:

Law No. 934

Article 1. A Ministry of Foreign Trade is hereby created, which hereafter shall be the only administrative center empowered to handle and supervise the foreign trade of Cuba, and to adopt whatever measures may be necessary or desirable to further our foreign trade and to fulfill the mission entrusted to it.

Article 2. The Ministry of Foreign Trade shall be in full charge of the study, design, planning, supervision and execution of all the economic and trade relations of Cuba with foreign countries, including exports as well as imports. To this end the Ministry of Foreign Trade shall:

a) Protect the interests and guarantee the satisfaction of the needs of the national economy in the activities inherent in or connected with foreign trade.

b) Prepare, and insure full compliance with, the directives and assignments concerning the foreign trade and the proportions provided for in the respective long and short term plans, in accordance with the requirements of the national economy, as provided for in the plans of the Revolutionary Government and with a view to a convenient international distribution of the work (sic).

c) To create conditions suitable for the systematic expansion of the foreign trade, fostering effective economic cooperation with all countries, predicated on equality, and mutual respect and benefits, and to co-

ordinate the economic relations with other countries, with a view to the development of the productive forces of the country and a higher standard of living for the population.

d) To supervise and insure the execution of the Foreign Trade Program.

e) To make certain that the pricing policy of the Revolutionary Government is strictly adhered to in all the activities and undertakings connected with our foreign trade.

f) To discuss, enter into and subscribe to trade and Customs agreements and treaties tending to stimulate the growth and stability of the country's foreign trade, and to see to the reciprocal observance of such agreements and treaties.

g) To prepare and issue fundamental directives concerning forms and procedures for the exportation and importation of goods.

h) To protect and control the foreign exchange funds involved in foreign trade transactions.

i) To guarantee the proper equilibrium of the international balance of payments, and the development, without difficulties, of the interchange of products with foreign countries.

j) To set up commercial representation offices and departments abroad in cooperation with the Ministry of Foreign Relations, and to see to the efficient operation thereof.

k) To furnish domestic producers with current information concerning the relations with, prices, technical progress, possibilities and prospects of foreign markets.

Article 3. Every year the Ministry of Foreign Trade shall prepare:

a) The proposed Exports and Imports Program that will determine the relations of the internal production and distribution of merchandise with the foreign trade.

b) The Foreign Exchange Program, which shall specify the ratio between the incoming and outgoing international exchange instruments derived from trade operations with foreign countries; and

c) The proposed Foreign Trade Financial Program, which shall evaluate the incidence of said trade on the Budget of the State and on the Credit Plans of the National Bank of Cuba. In the preparation of the pro-forma programs and plans as above provided, the Ministry of Foreign Trade shall work in contact with the Ministries and agencies of the State, and particularly with the Central Planning Board, the Ministry of the Treasury and the National Bank of Cuba, to which it shall deliver copies of said projects not later than October 31st of each year for their final approval by the Revolutionary Government.

It shall also prepare, together with the proposed plans and programs above provided for, a list of the necessities and supply commitments which, with the required anticipation shall be negotiated with countries planning bilateral or multilateral trade relations.

Article 4. In addition to the annual plans and programs referred to in the preceding Article, the Ministry of Foreign Trade shall prepare "Plans of Prospective Exports and Imports of Foreign Exchange and Finances for the Foreign Trade" in accordance with the terms and objectives provided for in the Global Plans of the Central Planning Board.

Article 5. The Ministry of Foreign Trade shall consist of such Undersecretariats, Divisions, Departments, Sections or Bureaus and other offices as the Minister may see

fit to provide for when he prepares the Budget of the Ministry, which shall be submitted by him to the approval of the Government.

Article 6. The direct and concrete transaction of trade operations involving imports and exports in accordance with the policy designed or adopted by the Ministry shall be handled by "special foreign trade enterprises or houses" with independent legal personality and with their own capital and administration, which shall be set up and operated under the supervision of the Ministry.

The enterprises to which this article refers shall act independently from the Ministry which, therefore, shall not be liable for the obligations undertaken by them.

Article 7. The Ministry of Foreign Trade shall be empowered not only to set up the abovementioned foreign trade enterprises or houses, but also to organize, merge, terminate and liquidate them, or to incorporate their assets and liabilities to any other agency designated by the Government.

Article 8. The Ministry of Foreign Trade shall be in charge of the control and collection functions handled by the Customs offices at all the ports and airports of the National Territory.

Article 9. All taxes, assessments, levies and duties heretofore payable at the Customhouses are hereby derogated insofar as said foreign trade enterprises or houses are concerned.

The profits derived from foreign trade transactions and resulting from the difference between the acquisition costs and the income or receipts collected for sales of all kinds of goods imported or exported by said foreign trade enterprises or houses.

For the purposes of the foregoing paragraph and until such time as the Revolutionary Government shall have released a final list of fixed prices, the Ministry of Foreign Trade shall maintain the present domestic prices for the purchases and sales of all popular consumption articles, raw materials, intermediate products for production purposes, machinery, equipment, spare parts and other essential products in which it may trade.

Article 10. Said foreign trade enterprises and houses shall deposit regularly in the Treasury Account of the National Bank of Cuba the difference between the acquisition costs and the collections referred to in the preceding Article.

Article 11. The Ministry of Foreign Trade and the foreign trade enterprises or houses aforesaid shall open in the National Bank of Cuba whatever accounts may be necessary for adjustments and payments.

Article 12. The Ministry of Foreign Trade shall prepare the Organizational Regulations of the Ministry, which shall be first submitted to the Government for approval; also the by-laws whereby said foreign trade enterprises and houses shall be governed.

Article 13. All the powers conferred upon the Ministry of the Treasury by Law No. 877, of September 24, 1960, are hereby transferred to the Ministry of Foreign Trade.

Article 14. The second paragraph of Article 77 of Law No. 877, of September 24, 1960, is hereby amended, so that hereafter it shall read as follows:

"Art. 77.—The importers or consignees of merchandise who are not satisfied with said deficiency bills and penalties may, after the due payment of the amount con-

stituting the subject of the claim, and within thirty business days counted from the day after that of the service of due notice thereof, contest such deficiency bills and penalties, for which the Contentious Administrative Appeal procedure shall be available to them".

Article 15. The First Transitory Provision of Law No. 877 of September 24, 1960 is hereby amended, so that hereafter it shall read as follows:

"First. Such conflicts as may arise as a result of the enactment of this Law, or incidentally to the application of its provisions, or of the legal provisions concerning Customs affairs or matters which have been superseded, derogated or amended thereby, shall be settled by the Minister of Foreign Trade, who is hereby expressly authorized to issue and adopt whatever resolutions and measures may be required therefor. The Resolutions of the Minister of Foreign Trade shall be subject to appeal, which must be lodged within thirty business days counted from the day after the notification thereof, through the Contentious Administrative remedy available in such cases".

If the Contentious-Administrative Appeal is allowed the State will reimburse what shall have been paid plus three per cent annual interest for the time elapsed from the date of the respective payment and the notification of the final ruling, in the form of a Certificate of Indebtedness which shall be transferable and may be used for the payment of any tax".

Article 16. The Second and Third Transitory Provisions of Law No. 877, of September 24, 1960, are hereby repealed.

TRANSITORY PROVISIONS

First. Effective as of the promulgation of this Law the Ministry of the Treasury shall effect the payments of the

Ministry of Foreign Trade by taking them from its available revenue, until such disbursements or expenses are duly provided for in the National Budget.

SECOND. Within the month following the promulgation of this Law the Ministry of Foreign Trade shall deposit in the Treasury Account of the National Bank of Cuba the sums which the former Foreign Trade Bank of Cuba may have pending under the heading of taxes, assessments, levies and profits under the current laws and regulations on the subject.

THIRD. The remedial actions already taken to contest resolutions of the Minister of the Treasury issued under the First Transitory Provision of Law No. 877, of September 24, 1960 which are being processed at present shall be disposed of by the Fiscal Arbitration Commission of said Ministry in accordance with the legislation whereby it is governed.

FOURTH. All the functions of a mercantile character heretofore assigned to said Foreign Trade Bank of Cuba are hereby transferred and vested in the foreign trade enterprises or houses set up hereunder, which are subrogated to the rights and obligations of said former Bank in pursuance of the assignment of those functions ordered by the Minister.

FIFTH. The Minister of Foreign Trade, in pursuance of the Third Special Provision of the National Bank Law, shall, in agreement with the President of the National Bank, make all necessary arrangements concerning the personnel, equipment and offices of the former Foreign Trade Bank of Cuba, which has been liquidated by that law. The Minister of Foreign Trade being hereby authorized to re-distribute, reorganize and readjust the functions formerly attended to by the Foreign Trade Bank of Cuba and now

assigned to his Ministry, along such lines and in such way as he may consider most beneficial to the organization of the Ministry and its dependencies.

SIXTH. The personnel attached to the Customs offices, including the Division of External Public Revenue and its dependencies are hereby transferred from the Ministry of the Treasury to the Ministry of Foreign Trade, under which they shall function hereafter.

FINAL PROVISION

All legal and regulatory provisions are hereby repealed insofar as they may be repugnant to this Law, which shall become effective from its publication in the Official Gazette of the Republic.

NOW, THEREFORE: I hereby order all persons fully to observe and enforce this Law.

DONE at the Presidential Palace, in Havana, this 23rd day of February, 1961.

OSVALDO DORTICÓS TORRADO

Fidel Castro Ruz, Prime Minister

Rolando Díaz Aztaraín, Minister of the Treasury.

(Official Gazette No. 6—Special—of February 23, 1961).

4. Resolution No. 1 of 1961

WHEREAS: The Fourth of the Transitory Dispositions of Law No. 934 of February 23, 1961 provides that all functions of a commercial nature that were assigned to the former Cuban Bank for Foreign Trade are attributed to the enterprises or foreign trade houses which are subrogated in the rights and obligations of said Bank.

WHEREAS: Article 6 of same Law No. 934 of February 23, 1961 bestows precise powers upon the undersigned for the creation of special enterprises or foreign trade houses, for the direct and concrete execution of the commercial operations of exportation and importation; said enterprises having full juridical personality, with patrimony and administration of their own.

WHEREAS: The Third of the Special Dispositions of Law No. 930 of February 23, 1961, of the National Bank of Cuba provides that of the capital of the former Cuban Bank of Foreign Trade, TWO MILLION PESOS ($2,000,000.00) shall be assigned to the capital of the enterprises or foreign trade houses to be created by this Ministry.

WHEREAS: To fulfill the objectives assigned to this Ministry, it is necessary to create an enterprise or foreign trade house for the direct and concrete execution of the commercial operations of exports.

NOW THEREFORE: In exercise of the powers vested upon me, I

RESOLVE:

FIRST: Create an enterprise or foreign trade house which shall be named "CUBAN ENTERPRISE FOR EXPORTS", to be domiciled at Infanta No. 16, corner of 23rd St. Street, Vedado, La Habana, vested with full legal capacity and with patrimony and administration of its own.

SECOND: The firm "Cuban Enterprise for Exports" which is created by this Resolution shall assume the direct and concrete execution of all the commercial export operations of the Nation, as well as the export operations of a commercial nature which were assigned to the former Cuban Bank for Foreign Trade, remaining subrogated in the rights and obligations of said Bank as regards the commercial export activities.

THIRD: The firm "Cuban Enterprise for Exports" shall be governed, as regards its activities, functions and organization, by Statutory By-Laws which will opportunely be drawn up for the most thorough development of the activities and tasks to it entrusted by the Law and by this Resolution under the guidance of this Ministry, in accordance with the State plans for foreign trade.

FOURTH: The direction, administration and legal representation of the firm "Cuban Enterprise for Exports" created by this Resolution, shall be entrusted to a General Manager who, until the Statutory By-Laws referred to in the preceding paragraph are dictated, shall assume its legal representation with whatever functions, faculties and attributions that may be necessary for the fulfilment of the objectives for which it has been created.

FIFTH: The initial capital of the firm created by this Resolution shall be constituted by the sum of THREE HUNDRED THOUSAND PESOS ($300,000.00) which shall be taken from the total assignment of TWO MILLION PESOS ($2,000,000.00) referred to in the Third Special Disposition of Law No. 930 of February 23, 1961.

SIXTH: The "Cuban Enterprise for Exports" created by this Resolution shall act with independence from this Ministry by virtue of the legal capacity and own patrimony which it has, therefore, the Cuban State shall not respond for the commitments entered into by said Enterprise, which in turn shall not be responsible of the commitments entered into by the Cuban State.

SEVENTH: Publish the present Resolution in the Official Gazette of the Republic for general knowledge.

Done in Havana, Ministry of Foreign Trade, on the first of March, nineteen hundred and sixty-one, "Year of Education".

MAJOR ALBERTO MORA BECERRA
Minister of Foreign Trade

APPENDIX E

Rule 28.1 Listing Of Parents, Subsidiaries And Affiliates

Citibank

The parent company for Citibank, N.A. is Citicorp. Attached is a listing of subsidiaries and affiliates furnished to the Federal Reserve Bank of New York as required for filing the 1980 Annual Report FRY-6 of Citicorp updated as of June 30, 1981.

Citicorp

Organization Chart Of Subsidiaries And Affiliates
(All are 100% owned or otherwise indicated)
As of June 30, 1981

Citibank International—Chicago
Citibank, N.A. (See Part 2 for its separate holdings)
Citibank (New York State), N.A.

—Carte Blanche Corporation
  —Carte Blance International Ltd.
  —Carte Blanche Merchandising Company
  —Carte Blanche Travel, Inc.
  —Prestige Gifts, Inc.
—Diners Club, Inc. (The)
  —Airport Sales Corp.
  —Automotive Charge Services, Inc.
  —BT Publications, Inc. (51%)
  —Consolidated Collectors, Inc.
  —Diners Agency Services Corp.
  —Diners Club Equipment Corp.
  —Diners Club Gift Services Corp.
  —Diners Executive Shopping Service
  —Diners Financial Corporation
  —Diners World Travel, Inc.
    —Fugazy Philadelphia, Inc.

—Six Sixty Shop, Inc.
—Travelco, Inc.
—DQM Corporation
—Financial Services, Inc.
—Transaction Technology, Inc.
—Klaka Corporation
Citibank (South Dakota), N.A.
Citicorp Associates, Inc.
—BHC Resources, Inc.
—Services Management Group, Inc.
—Services Management Group—Illinois, Inc.
—Capital Markets Sources, Inc.
—Central Capital Markets Sources, Inc.
—Citicorp Data Distribution, Inc.
—Government Resources, Inc.
—Citicorp Financial Services, Inc.
—Citicorp Management Resources, Inc.
(Formerly Automation Resources, Inc.)
—LBCI, Inc.
(Formerly Lexar Business Communications, Inc.)
—Correspondent Resources Headquarters, Inc.
—Correspondent Resources, Inc.
—CU Resources, Inc.
—Computer Professionals Unlimited, Inc.
—Inter-Continental Computing, Incorporated
—Thrift Resources, Inc.
—Thrift Services, Inc.
—FDS/New York Thrift Processing Services, Inc.
—Mutual Data Systems, Inc.
Citicorp Banking Corporation
—Citicorp Capital Investors Ltd.
—Citicorp International Capital, Ltd.
—Citicorp Credit Services, Inc.
—Citicorp Funding, Inc.
—Citicorp Homeowners, Inc.
—Advance Insurance Agency, Inc.
—Advance Life Insurance Agency, Inc.
—Advance Properties Corporation

—AMCAL Mortgage Corporation
—First Mortgage Corporation
—Insured Funding Corporation
—Spar, Inc.
—Tretop, Inc.
—Citicorp Industrial Credit, Inc.
—Citicorp Global Lease, Inc.
—Citicorp Omega Lease, Inc.
—Citicorp Leasing (Alyeska), Inc.
—Citicorp Lescaman, Inc.
—Citicorp Person-to-Person, Inc.
—Citicorp Acceptance Company, Inc. (California)
(Formerly Nationwide Financial Corporation of California)
—Citicorp Acceptance Company, Inc. (Delaware)
(Formerly Nationwide Financial Corporation (Delaware))
—Citicorp Acceptance Company, Inc. (Nevada)
(Formerly Nationwide Financial Corporation of Nevada)
—Citicorp Acceptance Company, Inc. (New Mexico)
(Formerly Nationwide Financial Corporation of New Mexico)
—Citicorp Person-to-Person Corporation (Florida)
—Citicorp Person-to-Person Financial Center, Inc. (Florida)
—Citicorp Person-to-Person Financial Center of Florida, Inc.
—Citicorp Person-to-Person Financial Center (Arizona)
—Citicorp Person-to-Person Financial Center (Montana)
—Citicorp Person-to-Person Financial Center (Utah)
—Citicorp Person-to-Person Financial Center, Inc. (Alabama)
—Citicorp Person-to-Person Financial Center, Inc. (Colorado)

—Citicorp Person-to-Person Financial Center, Inc. (Delaware)
—Citicorp Person-to-Person Financial Center, Inc. (Georgia)
—Citicorp Person-to-Person Financial Center, Inc. (Louisiana)
—Person-to-Person Insurance Agency, Inc. (Louisiana)
—Citicorp Person-to-Person Financial Center, Inc. (Missouri)
(Formerly Nationwide Financial Corporation of Missouri)
—Citicorp Person-to-Person Financial Center, Inc. (North Carolina)
—Citicorp Person-to-Person Financial Center, Inc. (South Dakota)
—Citicorp Person-to-Person Financial Center of Connecticut, Inc.
—Citicorp Person-to-Person Financial Center of Idaho, Inc.
—Person-to-Person Insurance Agency, Inc. (Idaho)
—Citicorp Person-to-Person Financial Center of Illinois. Inc.
—Citicorp Person-to-Person Financial Center of Nebraska, Inc.
—Citicorp Person-to-Person Financial Center of Utah
—Citicorp Person-to-Person Financial Services, Inc. (Colorado)
—Citicorp Person-to-Person Industrial Bank (Colorado)
—Citicorp Person-to-Person Investments, Inc. (Delaware)
—Citicorp Person-to-Person Mortgage Corporation (Nevada)
—Citicorp Person-to-Person Mortgage Corporation (Ohio)

—Citicorp Washington Financial Center, Inc.
—Citicorp Washington Industrial Loan Company
—Citicorp Washington Insurance Agency, Inc.
(Formerly Person-to-Person Insurance Agency, Inc. (Washington))
—Family Guardian Life Insurance Company
(Arizona)
—Family Guardian Life Insurance Company of New York
—Person-to-Person Insurance Agency, Inc. (Alabama)
—Person-to-Person Insurance Agency, Inc. (Arizona)
—Person-to-Person Insurance Agency, Inc. (California)
—Person-to-Person Insurance Agency, Inc. (Colorado)
—Person-to-Person Insurance Agency, Inc. (Connecticut)
—Person-to-Person Insurance Agency, Inc. (Florida)
—Person-to-Person Insurance Agency, Inc. (Georgia)
—Person-to-Person Insurance Agency, Inc. (Illinois)
—Person-to-Person Insurance Agency, Inc. (Indiana)
—Person-to-Person Insurance Agency, Inc. (Missouri)
—Person-to-Person Insurance Agency, Inc. (Montana)
—Person-to-Person Insurance Agency, Inc. (Nevada)
—Person-to-Person Insurance Agency, Inc. (New Mexico)
—Person-to-Person Insurance Agency, Inc. (Ohio)
—Person-to-Person Insurance Agency, Inc. (Oregon)
—Person-to-Person Insurance Agency, Inc. (South Carolina)
—Person-to-Person Insurance Agency, Inc. (South Dakota)
—Person-to-Person Insurance Agency, Inc. (Utah)
—Person-to-Person Insurance Agency, Inc. (Virginia)
—Person-to-Person Insurance Agency, Inc. (Wyoming)
—Citicorp Retail Services, Inc.
—Citicorp Credit, Inc.
—Citicorp Financial, Inc.

—Citicorp Services, Inc.
—Citicorp Translease, Inc.
—Citicorp Nachtwacht Lease, Inc.
—Citicorp Petrolease, Inc.
—Citicorp Sierra Lease, Inc.
—Citicorp Tulip Lease, Inc.
—CitiMex Lease, Inc.
—Citicorp (USA), Inc.
—Citimarlease (Burmah I), Inc.
—Citimarlease (Burmah Liquegas), Inc.
—Citimarlease (Burmah LNG Carrier), Inc.
—Citimarlease (Fulton), Inc.
—Citimarlease (Whitney), Inc.
Citicorp Business Credit, Inc.
Citicorp Community Development, Inc.
—Broadgo, Inc.
—Garp, Inc.
—Krabco, Inc.
—Mission Park Corporation (80%)
—Pimat, Inc.
Citicorp Delaware Services, Inc.
Citicorp International Group, Inc.
—Asia Pacific Capital Corporation Limited (70%)
—Citicorp International Bank Ltd.
—Citicorp International Bank, S.A.
—Citicorp International Finance S.A.
—Citicorp International Limited
—Citicorp International Middle East Exempt Company
—Citicorp International (Singapore) Ltd.
—Orient Pacific Capital Investment Corporation (49%)
Citicorp International Holdings, Inc.
Citicorp Investment Management, Inc.
Citicorp Management Services, Inc.
Citicorp Overseas Finance Corporation Limited
Citicorp Overseas Finance Corporation N.V.
Citicorp Overseas Services, Inc.
Citicorp PBI), Inc.
Citicorp Realty Consultants, Inc.

CitiFlight, Inc.
Citilease, Inc.
—Citilease Co., Ltd.
FNC Realty Corporation
Retail Consumer Services, Inc.
Westchester Conference Center Development Corporation

EQUITY HOLDINGS OF CITIBANK, N.A.

Agememnon Incorporated
Banco de Honduras S.A. (97.4%)
Banco Inter-Unido (50%)
Bank of Lebanon and Kuwait S.A.L. (38.5%)
BLT Realty Inc.
Camwil Lease, Inc.
—Citicorp Investor Lease, Inc.
—Citicorp Multilease (SEF), Inc.
Caribbean Merchant Bank Ltd.
Citibank (Channel Islands) Limited
Citibank International
Citibank (Luxembourg) S.A.
Citibank-Maghreb
Citibank N.A. Limited
—Citibank Nominees (Pty.) Ltd.
—Citibank Services (Pty.) Limited
Citibank N.A. Niger S.A.
Citibank Overseas Investment Corporation
(See Part 3 for its Separate Holdings)
Citibank (Zaire) S.A.R.L. (90%)
Citibank Zambia Limited
Citibelsa S.A.
Citicard, Inc.
Citicorp Capital Ltd.
Citicorp Interim Services, Inc.
Citicorp Leasing, Inc.
Citicorp Real Estate, Inc.
Citicorp Securities Company, Inc.
Citicorp Venture Capital Ltd.
(Formerly FNCB Capital Corporation)
—Caddis Corporation

CitiMae, Inc.
Cititrust (Bahamas) Limited
—Albacore Investmetns, Ltd.
—First National Nominees, Ltd.
—Providence Associates, Ltd.
Cititrust (Cayman) Limited
CityTrust Banking Corporation (40%)
Consumer Services International Corporation
—FIT Beteiligungsgesellschaft mbH
—FIT Beteiligungsgesellschaft and Co. Treuhand KG and Co.
Vermogensverwaltungs KG (62.11%)
(See below for additional ownership)
—FIT Beteiligungsgesellschaft and Co. Treuhand KG
—KKB Bank KGAA (42.95%)
(Formerly Kundenkreditbank Kommanditgesellschaft Auf Aktien)
(See below for additional ownerships)
—Matrix Ltd.
—Taiwan First Investment & Trust Co., Ltd. (40%)
Coqui Investments, Inc.
Cosmopolitan Realty Corp.
Cuban American Nickel Company
—Moa Bay Mining Company
Delexco Inc.
DSS Realty Inc.
Far East Bank Limited (76%)
—Far East Bank Nominees Limited
Fast-Pic Photos Corp.
First National City Bank of New York (Nigeria) Limited (The)
Fonocob Realty Corporation
Grindlays Bank Limited (49%)
Groupement D'Interet Economique "Paris Citicorp Center" (1%)
(See below for additional ownerships)

International Banking Corporation
—Societe Elysees-Boetie
—Citibank, S.A.
—Groupement D'Interet Economique "Paris Citicorp Center" (1%)
(See above and below for additional ownerships)
—Groupement D'Interet Economique "Paris Citicorp Center" (94%)
(See above and below for additional ownerships)
Lotus Blossom Investments, Inc.
Matin Realty, Inc.
—Imref S.A. de C.V.
Mint Julep, Inc. (The)
National City Nominees Ltd.
NCB Trust Ltd.
—Citibank Financial Trust (Ireland) Ltd.
—Citibank London Nominees Limited
—Citibank Nominees (Ireland), Ltd.
—Citibank Nominees Ltd.
—Citibank Trustees (Ireland), Ltd.
—Duddell Finance Ltd.
New York London Finance Company, Ltd.
Office Towers Limited
Orbdem Corporation
Perennially Green, Inc.
Perpo Lease, Inc.
Saudi American Bank (40%)
Woodroofe Gallery, Inc. (The)

EQUITY HOLDINGS OF CITIBANK OVERSEAS INVESTMENT CORPORATION

—Arrendadora Finac, S.A. de C.V.
—Arrendadora y Administradora Citycol S.A.
—Compania Colombiana De Financiamientos, S.A. (90.4%)
(See below for additional ownership)
—Compania Exportadora Cityexport S.A. (5.2%)
(See below for additional ownership)

—Representaciones Financieras S.A.
—Asesores de Finanzas, S.A. de C.V.
—Assurantiemaatschappij Financia N.V. (30%)
(See below for additional ownership)
—Atlantic Trailers Carrier Corporation
—Banco Internacional de Colombia, S.A. (49%)
—Banco Internacional De Colombia (Nassau) Limited
—Broad Investment Corporation
—Citicorp Trust Company
—Carte Blanche Australia Limited
—Carte Blanche Deutschland GmbH
—Carte Blanche Espana S.A.
—Centaur Investment Corporation
—Citibail S.A.
—Groupement D'Interet Economique "Paris Citicorp Center" (1%)
(See above and below for additional ownerships)
—Citibank Aktiengesellschaft
—FIT Beteiligungsgesellschaft and Co. Treuhand KG and Co.
Vermogensverwaltungs KG (37.89%)
(See above for additional ownership)
—KKB Bank KGAA (49.70%)
(Formerly Kundenkreditbank Kommanditgesellschaft auf Aktien)
(See above for additional ownership)
—Kredit-und Versicherungs-Vermittlungsgellschaft mbH der KKB
—Mandata GmbH fur Rechtsbesorgung und Inkasso
WAKA Vermogensverwaltung GmbH
—Citibank (Austria) Aktiengesellschaft (63.8%)
—Citibank-Credito, Financiamento e Investimento S.A. (46.35%)
(See below for additional ownership)
—Citibank-Distribuidora De Titulos E Valores Mobiliarios S.A.
(Formerly Citybank Distribuidora De Titulos E Valores Mobiliarios, S.A.)

—Citibank Finance Limited
—Citibank Financial Trust Ltd.
  —Citibank Credit Ltd.
  —Citibank Leasing Ltd.
  —Citibank Trust Ltd.
    —Citibank Assurance Company Limited
      —Citibank Trust Nominee Ltd.
—Citicard S.A. Commercial Financiera y de Servicios
  —Diners Club Argentina S.A. Comercial y De Turismo (75%)
    (See below for additional ownership)
    —Diners Travel S.A.C.y F.
    —Servicios Comerciales S.A.C.I.M.y F.
  —Diners Club Uruguay S.A. (75%)
    (See below for additional ownership)
—Citicorp Aerolease (IB), Inc.
—Citicorp Canada Finance Co. Ltd.
—Citicorp Carriers, Inc.
—Citicorp Commercial Finance (H.K.) Ltd.
—Citicorp Credit
—Citicorp Credit Saipan, Inc.
—Citicorp East-West Services, Inc.
    —Citicorp East-West Services Ges. mbH
—Citicorp Finance and Security (Thailand) Ltd.
—Citicorp Finance B.V.
—Citicorp Financial Advisory Service, Inc.
—Citicorp Finanziaria S.p.A.
—Citicorp Gulf Finance Ltd.
—Citicorp Leasing (Deutschland), G.m.b.H.
—Citicorp Leasing Gesellschaft mbH
—Citicorp Leasing International, Inc.
  —Arrendadora Banamex S.A. De C.V. (40%)
  —Citicorp Canada Limited
    —Citicorp Industrial Credit (Canada) Limited
    —Citicorp Leasing Canada Limited (60%)
  —Citicorp Data Services S.A.
  Citilease Internacional, S.A. (50%)

—Citicorp Leasing Nederland, B.V.
—Citicorp Leasing of Puerto Rico, Inc.
—Citicorp Location (France) S.A.
  —Groupement D'Interet Economique "Paris Citicorp Center" (1%)
    (See above and below for additional ownerships)
—Citicorp Ltd.
  —Citicorp Finance Company Limited
  —Citicorp Realty Ltd.
—Citicorp S.A.
—Citicorp y Rio-Banco De Inversion, S.A. (70%)
—CitiFinanciera, S.A.
—Citilease, S.A.
—Compagnie Pour le Placement et le Financement S.A.
—Compania Colombiana de Financiamientos, S.A. (9.6%)
  (See above for additional ownerships)
—Compania Exportadora Cityexport S.A. (94.8%)
  (See above for additional ownership)
—Comptoir de Financements Menager Fimen, S.A.
—Corment Carriers S.A.
—Diners Club Argentina S.A. Comercial y De Turismo (25%)
  (See above for additional ownership)
—Diners Club (Canada) Limited (The)
—Diners Club Insurance Agency Limited (The)
—Diners Club Uruguay S.A. (25%)
  (See above for additional ownership)
—El Chaco S.A. Financiera
—Famibank S.A. (99%)
  —Algemene Hollandse Krediet & Depositobank N.V.
  —Assurantiemaatschappij Financia N.V. (70%)
    (See above for additional ownership)
  —Financia Nederland N.V.
  —Perfina Personalkredit-und-Finanzierungs A.G.
—Financiera Citicorp S.A. (50%) (Spain)
—Financiera Citicorp, S.A. (Dominican Republic)
—First Citicorp Leasing, Inc. (50%)
—First National Finance Limited (75%)

—FNCB Finance Limited
—FNCB Financial, Ltd.
  —Carte Blanche International (Hong Kong) Ltd.
—FNC Comercio e Participacoes Ltda.
  —Citibank-Credito, Financiamento e Investimento S.A.
    (53.65%)
    (See above for additional ownership)
  —Citicorp Leasing, S.A. Arrendamento Mercantil
  —Finaco Ltda.—Administradora De Bens e Servicios
  —Omnia Empreendimentos e Participacoes Ltda.
    —Citibank Corretora de Seguros S.A.
—FNC-Corretora de Titulos e Valores Mobiliarios S.A.
—Foremost Investment Corporation
—Fuji National City Consulting, Ltd.
—Inarco International Bank N.V.
—International Finance Associates, B.V.
—Inversiones, Credito y Exportaciones, S.A.
—Inversiones y Adelantos, C.A.
  —Arrendequipos C.A.
  —Citidata, C.A.
—Investors' Finance Corporation (40%)
—Langross Carriers, Inc.
—National City Financial Services
—Nessus Investment Corporation
  —Citicorp Australia Holdings Limited
    —Citicorp Australia Limited
      —Citicorp Canberra Pty. Limited
      —Citicorp Financial Services Limited
      —Citicorp Wholesale Pty. Limited
      —Citigeneral Insurance Australia Limited
        (Formerly Ajax Insurance Company Limited)
        —Union Building Society
      —Citilife Insurance Australia Limited
        (Formerly Surrey Insurance Company Limited)
      —Person-to-Person Financial Services Pty.
        Limited
    —Citicorp Investments Limited
—Nostro Investment Corporation

—Pemlease, Inc.
—Rentalco
—Ripco S.A.C.I. y F.
—Servicios Integrales, S.A.
—Sociedade Comercial Citibank Leasing Ltda.
—Yonder Investment Corporation
  —Famicredit
    —Groupement D'Interet Economique "Paris Citicorp Center" (1%)
      (See above and below for additional ownerships)
  —Societe de Credit pour l'Acquisition et l'Amelioration des Immeubles, S.A.
    —Groupement D'Interet Economique "Paris Citicorp Center" (1%)
      (See above for additional ownerships)
    —SCI "Cirque-Champs Elysees"

Joint Appendix

No. 81-984

Office - Supreme Court, U.S.
FILED
DEC 8 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FIRST NATIONAL CITY BANK,
Petitioner,

v.

BANCO PARA EL COMERCIO EXTERIOR DE CUBA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed November 25, 1981.
Certiorari Granted October 18, 1982.

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Relevant Docket Entries

Date	Proceeding
February 1, 1961	Complaint filed and Summons issued
March 8, 1961	Answer filed
July 7, 1961	Stipulation and Order filed Substituting Republic of Cuba in place of Plaintiff and permitting Plaintiff to serve and file a Supplemental Complaint in the form annexed, by Dimock, J.
November 6, 1974	Plaintiff's Answer to Request for Admissions filed
May 2, 1975	Plaintiff's Notice of Motion to Substitute Cubazucar as Plaintiff and Affidavit filed
May 29, 1975	Defendant's Memorandum in Opposition to Motion to Substitute filed
July 1, 1975	Plaintiff's Reply Memorandum and Affidavit in Support of its Motion to Substitute filed
August 4, 1975	Order filed denying Plaintiff's Motion to Substitute by Bryan, J.
December 21, 1976	Reply to Counterclaim filed
January 5, 1977	Non-Jury Trial begun before Bryan, J.
January 6, 1977	Trial continued
January 7, 1977	Trial continued
January 12, 1977	Trial continued
January 13, 1977	Trial continued
January 26, 1977	Amended answer filed

Date	Proceeding
January 26, 1977	Reply to Amended answer filed
January 26, 1977	Trial continued and concluded
January 14, 1978	Notice of Reassignment from Judge Bryan to Judge Brieant
January 4, 1980	Opinion filed
March 14, 1980	Judgment entered
April 8, 1980	Plaintiff's Notice of Appeal filed
August 4, 1981	Opinion of the United States Court of Appeals for the Second Circuit filed
August 18, 1981.....	Appellant's Petition for Rehearing and Suggestion for Rehearing In Banc filed
November 13, 1981	Order Denying Rehearing
November 25, 1981	Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit filed
January 25, 1982	Respondent's Brief in Opposition to Petition filed
February 2, 1982.....	Petitioner's Reply Brief filed
September 1982	Brief for the United States as Amicus Curiae filed
October 18, 1982	Writ of Certiorari granted

Cuban Law Decree No. 1425 of May 12, 1954

THE CUBAN BANK OF FOREIGN TRADE
LAW-DECREE No. 1425 of May 12, 1954
(Official Gazette of May 13)

Creates the Cuban Bank of Foreign Trade as a credit institution with judicial and legal capacity, autonomous nature and indefinite term, with the objective of supplying the financial means necessary for the promotion, maintenance and development of our foreign trade, providing or complementing private action when this proves insufficient. Specifies that its captial at formation will be three and one half million pesos ($3,500,000.00) which will be able to be increased up to six and one half million pesos ($6,500,000.00) by means of the issuance of new shares, which will be classified in Series A, B and C, depending upon whether they are in the charge of the the Cuban Government or underwritten by banks associated with the National Bank of Cuba, or authorized or financed by it, or underwritten by agricultural or industrial merchants or producers. So too this establishes the organization and management of the Bank, outlining its operations and other dispositions necessary for its best functioning.

CHAPTER I

On the Creation, Denomination, Location and Objective of the Cuban Bank of Foreign Trade

Article 1. - A credit institution named the Cuban Bank of Foreign Trade is created, which will have judicial and legal capacity, autonomous nature and indefinite term, and which will be ruled by the dispositions of this Law-Decree and its Statutes and Regulations.

Article 2. - The Cuban Bank of Foreign Trade will have its domicile in the city of Havana and will be able to establish branches and name agents inside and outside the national territory.

Article 3. - The Cuban Bank of Foreign Trade will have as its objective the provision of the necessary financial means for the promotion, maintenance and development of the foreign trade of Cuba, providing or complementing private action when this proves insufficient.

CHAPTER II

On Capital and Shares

Article 4. - The Cuban Bank of Foreign Trade is established with a capital of three and one half million pesos, represented by thirty-five thousand shares with a nominal value of one hundred pesos each, which are subscribed for and paid for by the Cuban Government with the part of the product of the Veterans, Tribunals and Works issuance of Bonds, 4% 1953-1983, authorized by clause 5 of Article 5 of the Law-Decree number 1232, of December 28, 1953, which quantity is determined by this precept.

The shares underwritten and paid for by the Cuban Government will be delivered into the custody of the National Bank of Cuba, which will represent the Cuban Government in the exercise of all the rights and actions which correspond to it as shareholder of the Cuban Bank of Foreign Trade.

Article 5. - The capital of the Cuban Bank of Foreign Trade will be able to be increased up to six and one half million pesos, through the issuance of new shares for sale in any of the following cases:

a) That banks associated with the National Bank or authorized by or financed by it request participation in the social capital of the Cuban Bank of Foreign Trade, or

b) That merchants settled in Cuba and dedicated to the business of import or export of goods, or agricultural or industrial producers, also settled in the country and dedicated to production destined for international markets, or official organizations wherein any of these may gather, request participation in the capital of the Bank.

Article 6. - So that the request for participation in the social capital of the Cuban Bank of Foreign Trade may be acceded to, the following prerequisites will be essential in such cases as referred to in the previous article:

a) That banks associated to the National Bank of Cuba or authorized or financed by it solicit the issuance of up to one million pesos in stock, and offer to underwrite and pay five hundred thousand pesos of this issuance in cash, and

b) That the persons, enterprises or entities referred to under letter b) of the preceding article, request the issuance of shares up to the quantity of two million pesos, and offer to pay no less than one million pesos in cash.

In accepting the solicitation, the term will be fixed when the remaining half of the unpaid capital is made effective as inactive dividend.

Article 7. - In the case of such a request as referred to in the previous article, the Board of Directors of the National Bank, or the Board of Managers of the Cuban Bank of Foreign Trade, depending on procedure, will accord the corresponding increase in capital and will establish the prerequisites of the issuance and underwriting of the shares with the objective of guaranteeing the interests of the minority shareholders.

Article 8. - Though the capital of the Cuban Bank of Foreign Trade may be increased, its shares will be classified in the following series:

Series A. - Thirty-Five thousand shares of $100.00 each, in the charge of the Cuban Government.

Series B. - Ten thousand shares of $100.00 each to be underwritten by banks associated with the National Bank of Cuba or authorized or financed by it.

Series C. - Twenty thousand shares at $100.00 each to be underwritten by merchants and industrial or agricultural producers related to letter b) of preceding Article 5.

Article 9. - The shares of the Cuban Bank of Foreign Trade will be registered. The shares of Series A will be untransferable. The shares of the other Series will be transferable by endorsement. Notwithstanding the preceding, said shares will not be able to be transferred to persons or entities not included under the preceding Article 5.

Article 10. - In the case of any person or entity who is shareholder in the Cuban Bank of Foreign Trade going into liquidation proceedings due to bankruptcy, the amount of the shares subscribed to by same will be applied to their debts with the Cuban Bank of Foreign Trade; delivering the remainder, if existing, to the disposition of the bankruptcy action.

The Cuban Bank of Foreign Trade will have equal preference with respect to amounts regarding bankruptcy that for any reason might be found in its possession.

Article 11. - The Cuban Bank of Foreign Trade will open a Registration Book of Shares in Circulation. The nature of the stockholders will be accredited by said book, and it will be the responsibility of the Secretary of the Cuban Bank of Foreign Trade under the supervision of the Managing Director.

Article 12. - The shares of the Bank will the dividends that the Board of Managers agree upon at the close of each economic year, with reference to profits perceived, with the latter not exceeding ten percent (10%) per annum. See Article 49.

Article 13. - The shares will participate, with one vote for each, in the Stockholders' Meeting of the Bank.

Article 14. - The stockholders will individually respond to payment of obligations contracted by the Cuban Bank of Foreign Trade only with the amounts they might have paid or should have paid for the shares issued in their favor.

Article 15. - In case of liquidation of the Cuban Bank of Foreign Trade, its assets and free reserves will respond preferentially to the payment of its obligations. Such resulting amounts, after payment of all obligations, will be distributed by proration among the stockholders.

CHAPTER III

On the Organization and Management of the Bank

First Section

Procedural Mediums

Article 16. - The Cuban Bank of Foreign Trade will be governed by its Stockholders' General Meeting, by its Board of Managers, and by its Managing Director in agreement

with the dispositions of this Law-Decree and its Statutes.

While the Government will be the only stockholder of the Bank, the attributes and functions, which this Law-Decree stipulates, belong to the Stockholders' Meeting and to the Board of Managers, will be exercised by the Executive Council of the National Bank of Cuba.

Second Section

On the Stockholders' Meeting

Article 17. - The Stockholders' Meeting will be formed by common persons or legal possessors of their shares, and will be convened and presided over by the Managing Director.*

Article 18. - The Stockholders' Meeting will be convened each time that the legitimate possessors of no less than one-third part of the subscribed shares of one of the Series, and necessarily, on the third Monday of the month of May and December of each year, or the following working day if any of the aforementioned are holidays.

* See the previous Article 16 where in its second paragraph outlines that while the Government is the only shareholder, the powers and functions of the Stockholders' Meeting and of the Board of Managers will be exercised by the Executive Council of the National Bank of Cuba.

In the ordinary session which is held the third Monday of the month of May, the projected budget for the following fiscal year which begins the first day of July, will be prepared and presented by the Board of Managers.

In the ordinary session which is held the third Monday of the month of December, the Statement, General Balance, and Budget Expenditures corresponding to the previous economic fiscal year will be presented, application of profits will be agreed upon, as well as accounting of capital reserves, and a member of the Board of Managers and his substitute will be elected, assuming their posts the first working day of the month of January of the following year, supplanting the member of the Board of Managers whose term runs out on this date.

In extraordinary sessions, only subjects for which the meetings are called will be dealt with.

Article 19. - In addition to the functions mentioned in the previous Article, the Stockholders' Meeting will have the following responsibilities:

A) To approve the projected expenditure budget for the annual economic fiscal year submitted to it by the Board of Managers, or return it to this organization with objections and observations considered pertinent;

The Board of Managers will adapt the budget, taking such objections and observations recommended by the Stockholders'

Meeting into account, and this budget will become effective for the corresponding economic fiscal year.

To reject said objections and observations, three quarters vote of the members who make up the Board of Managers will be required.

B) To agree to investigations that must be carried out in the administration of the Cuban Bank of Foreign Trade; designation from itself an Auditors' Commission with up to three auditors from outside.

C) Recommend the measures which it considers most applicable for the better development of the Cuban Bank of Foreign Trade and

D) To approve or reject the issuance of securities authorized by this Law-Decree. (See footnote page 4)

Article 20. - The concurrence of half plus one of the shares will be enough for the convening of an ordinary session, although those of whichever of the Series may not be present. For the extraordinary sessions, the concurrence of half plus one of the shares corresponding to each Series will be required.

In both cases, the agreements taken by the majority of votes within each Series, computing the votes of each Series by the

number of shares that correspond to said Series, although not all the shares were represented. Each share will have the right to one vote.

For approval of the budget, the vote of at least two-thirds of the issued shares will be necessary, in accordance with the Series they represent, with the computation made in the form previously indicated.

Third Section

On the Board of Mangers

First Part - Organization

Article 21. - The Board of Managers will be composed of no less than five and no more than nine members designated in the following way:

Three by the Executive Council of the National Bank of Cuba, from which one will be named Managing Director by the President of the Republic, assisted by the Council of Ministers, and which will correspond to Series A of the shares.

And at least one for each of the other Series in which the social capital is divided, without exceeding three per Series.

If there is only one Series, the designation of at least two Managers will be in order.

Article 22. - The election of the members of the Board of Managers will be made by

separate voting by the holders of shares in each Series. Regarding this election, each share will count as one vote. Each Manger, including the Managing Director, will have a substitute who will be designated at the same time and with the same formalities as the original. Nevertheless, the substitute of the Managing Director will not substitute in the administrative and executive functions outlined in this Law; they will be assumed in the case of provisional absence by the person designated to this effect by the Board of Managers. The substitution will be limited to functions as member of the the Board of Managers.

Article 23. - The Managers will be compensated from the dividends which correspond to the holders of the shares which they represent, if the latter designate more than one Manager for each Series. If the number of Managers is limited to one for each Series, the compensation which they should receive will be fixed in the budgets, which will be, in part, fixed as salary, and in part, as allowance for meeting attendance.

Article 24. - In the voting on subjects submitted to the Board of Managers, the votes of each Manager will count in proportion to the number of shares of the Series which elected them. In case one Series may have designated more than one Manager, the vote of each of these Managers will be evaluated in proportion to the votes obtained in the Meeting which designated them.

Article 25. - The length of term of the post of Manager will be six years. Nevertheless, after the first designations are made, the terms will be fixed in such a way that their make-up is partially renewed. The Statutes will outline the rules to this effect.

All Managers will discharge their duties for ther term of their mandate and until the designation and taking of possession of their substitutes.

Article 26. - The substitutes will only exercise their functions as Managers in the case of provisional absence of the originals. If the absence becomes definitive, new Managers will have to be designated, in the form anticipated by this Law-Decree and the substitutes will discharge their duties until the new designees take possession.

Article 27. - It is required for membership on the Board of Managers:

a) To be a Cuban citizen;

b) To be no less than thirty years of age;

c) To have a recognized and solid moral reputation;

d) To exercise or to have exercised important economic activities; or to have accredited capacity in relation with international commerce.

The prerequisite of citizenship under clause a) of this Article could be dispensed with upon request by the shareholders of whichever Series, when the member designated by them were not a Cuban citizen, but who possessed outstanding qualities for the undertaking of such a position.

The power to concede or refuse said exception will belong to the Executive Council of the National Bank of Cuba, and it will only be in force for the fiscal year for which it was requested, and without, in any case, the number of foreigners exceeding 40% of the total of the members of the Board of Managers.

Article 28. - No persons can be Managers who are prohibited from carrying on trade, or who are overdrawn in some bank, or credit establishment by overdue obligations, who has utilized the benefits of a release from debt, or adjournment or suspension of payments, or who has been declared in bankruptcy, or has met with creditors, or suffered judicial sanction for any transgression which may have cast him in an unfavorable public image, and those who, in regard to Cuban citizens, do not enjoy full political rights.

The duties of the Managers and of the Secretary will be incompatible with the active exercise of any other duties remunerated by the Government, the Province, or Municipality.

Article 29. - Those who are related among themselves to the fourth degree of

consanguinity, or to the second by marriage, may not belong to the Board of Managers at the same time.

Nor will relatives within the fourth degree of consanguinity or the second of marriage of the members of the Board of Managers be able to be named employees or functionaries of the Cuban Bank of Foreign Trade.

Article 30. - The Managers will carry out their duties for the designated term outlined in this Law-Decree and they can only be removed in the following cases, with prior legal action by the Administrative Disputes and Special Laws Court of the Supreme Court of Justice:

a) When found to be covered by some of the incompetences, incompatibilites or prohibitions outlined in this Law-Decree.

b) When conduct may be contrary to the fulfillment and objectives of this Law-Decree and of the Statutes of the Cuban Bank of Foreign Trade.

c) When judicially sanctioned for any transgression that may have cast them in an unfavorable public image.

d) When responsible for illegal acts or operations.

e) When an immoral, inappropriate or scandalous conduct in his social life is observed which would cause public distrust.

f) When absent without justifiable cause from three consecutive sessions, or six in one year.

Article 32. - The removal of Managers will be initiated at the instance of the Stockholders' Meeting, the Board of Managers, or of the Accounts Court. When such a demand is known, the Administrative Disputes and Special Laws Court will commence action and designate one of its Magistrates, Instructor Justice, to the end of carrying out the action; being able to declare the suspension of the Manager in question when so requested, or when so judged by the Instructor Justice or Court; guarding always the prestige of the Cuban Bank of Foreign Trade and keeping in mind that it maintain the solid confidence of the public.

When the action of removal is established, transferral of the duties of the affected Manager will be made so that he may contest within the term of three days, putting forth such proof as deemed pertinent. Proofs proposed by both parties will be brought forth within the unextendable period of ten working days.

When this term has run out, public notice will be given within the following five working days, and it cannot be delayed for any cause, and the sentence will be declared within the following three days.

A sentence demanding removal of a Manager from his post will cause cessation of same from the momemt of personal or courtroom notification; and it will be published in the Official Gazette of the Republic.

Article 33. - The Board of Managers will meet in ordinary session times when it so decides and at least, twice monthly, to be aware of all business that may be submitted to it by the Managing Director, or that may be proposed by one of the Managers or by the majority of the shareholders in one of its Series, and when related to its duties. To these ends, the Managing Director will make the necessary notice of meeting.

Whenever the Managing Director deems it necessary, or two Managers make a written request, an extraordinary session may be convened; in both cases, the object of the meeting be declared. Any matter may be discussed in the Board of Managers meetings if all the Managers are present, whether or not included in the order of the day, excepting opposition by one Manager to such discussion.

Article 34. - The quorum at the first notice of meeting will be made up of four Managers, with one always the Managing Director, except in those cases that require a greater number of Managers, with the Managing Director present or not.

The session will be presided over by the Managing Director and in his absence, by the Manager that the Board of Managers so designates in each case.

Article 35. - Agreements will be reached by the majority of those present, computed according to Article 24, and will be entered into the Proceedings Record which, foliated and duly stamped by the Justice or applicable Notary Public, will be maintained by the Cuban Bank of Foreign Trade and in which will be entered the proceedings, signed by all the Managers present, and certified by the Secretary with the supervision of the Managing Director.

Second Part

Duties of the Board of Managers

1) To agree on the general rules for the development of its operations.
2) To outline the credit policy of the Bank; point out the activities in international trade that should be preferentially attended to and establish maximum limits on the assignation of credit for such activities, depending upon what is suitable to the Balance of Payments of the Republic. *
3) Analyze the requests and proposals related to its operations.
4) Agree upon the authorized payments as per Clause 4) of Article 42 of

*(To adopt the agreements undertaken herewith, the favorable vote of no less than three fourths of the total number of Managers is required as per last paragraph of this same Article.)

this Law Decree. *(See footnote previous page)

5) Agree upon the purchases, sales and security pledges of goods or products destined for the international markets.

6) Dictate the internal regulations necessary for the functioning of the institution; adequately circulating them.

7) Agree upon the annual Budget of Debits and Revenues.

8) Settle the Annual Budget and verify the General Balance and Statement of Gains and Losses, within the sixty days of the end of each fiscal period.

9) Draw up the annual report which, along with the General Balance, Statement of Gains and Losses and the Annual Budget Settlement, will be submitted to the Stockholders' Meeting and to the Accounts Court and will be remitted to the Executive and Legislative authorities.

10) Agree upon the opening of accounts with official or private national or foreign banks.

11) Agree upon the opening or closing of branches, agencies, dependencies.

12) Propose to the Stockholders' Meeting the issuance of securities authorized by Clause 5) of Article 42 of this Law-Decree.* See Footnote Pg.8

13) Form the adminsitrative organization of the Bank and agree on the naming of its functionaries and

employees; outlining their duties and faculties, as well as the surety they must give.

14) Form delegations of operations in its branches, agencies, of its agents and functionaries.

15) Agree upon the making of contracts and arrange the exercise of judicial or extrajudicial actions which correspond to them.

16) Grant authority for administration and (actos de dominio)* and for litigations, transactions and whatever else may be necessary.

17) Agree upon the purchase, sale or rental of real property and furnishings for the offices of the Bank or its branches, agencies, and agents.

18) Agree upon the purchase and sale of public or private securities.

19) Engage national or foreign technicians for terms no greater than three years, as well as personnel for the temporary duties for a maximum time of one year.

20) Oversee the administration of the Bank and prepare its inspection, at least once a year, by accountants or auditors of good reputation contracted for that purpose, with the resulting reports submitted to the Stockholders' Meeting.

21) Be acquainted periodically with the movement of accounts of the Bank and existing balances.

22) Create the Technical Committees which it considers appropriate

with duties and functions that it may assign to them.

23) Advise the Ministry of State on questions pertaining to foreign trade and participate by means of representatives designated for that purpose in the delegations and discussions on treaties of international trade or payment arrangements.

24) Exercise the other duties expressly conferred upon it by the dispositions of this Law-Decree and those which are not held by some other organization of the Bank and whatever others require the operations which constitute its objective in conformity with this Law-Decree, the Commerce Code and other applicable laws.

To adopt the agreements incurred under Clauses 2), 4) and 12), a favorable vote of no less than threefourths of the total number of Managers is necessary.

Part Three

On the Managing Director and Other Functionaries

Article 37. - The Managing Director is the executive authority of the Cuban Bank of Foreign Trade, its legal representative, and superior officer and personnel. It is the Managing Director who carries out and has carried out the Law, Statutes of the Bank, Regulations and agreements of the

Board of Managers, who presides over the Stockholders' Meeting, and meetings of the Board of Managers and who exercises the functions delegated to him by the Board of Managers.

Article 38. - The Managing Director will be assisted by two specialized Assistant Managers, one in the international markets for Cuban products, and the other in the import requirements for the country.

Article 39. - The Secretary will be in charge of the Stock Register Book, the Proceedings Record of the Board of Managers and of the Stockholders' Meetings, will have custody of the Bank Stamp (Seal), will countersign the Notices of Meetings; will attend the Stockholders' Meetings and the meetings of the Board of Managers, certifying the agreements adopted; and will exercise the other duties appropriate to his position and those which may expressly be delegated to him by the Board of Managers. To be named Secretary, it is required that he be a Cuban citizen, and have a solid moral reputation, and to be a Lawyer with no less than five years of active exercise of the profession.

Article 40. - The designation of the Secretary will be made by the Board of Managers except when it shall be done for the first time, when it will be done by the President of the Republic.

He will not be able to be removed from his position except by the causes and

procedures established in Articles 31 and 32 of this Law-Decree.

Article 41. - The Board of Managers will regulate the system of personnel building to create a body of competent, honest and useful functionaries and employees; regulating promotion and immobility. Entrance will be by Competition. The Board of Managers will dictate the rules according to which these tests will be realized as well as the procedure for correction, suspension or removal from post. A course of appeal against the resolutions which the Board of Managers outline will be granted before the Administrative Disputes and Special Laws Court of the Supreme Court of Justice of the Republic, if the removal of the functionary or his suspension from employment and from remuneration has been entailed.

CHAPTER IV

On the Operations

Article 42. - The Cuban Bank of Foreign Trade will be able to carry on the following operations:

1. - To finance the exporters, carry out all types of bank operations, whether of short, medium or long term. Credits at long or medium term and the operations required for the transitory acquisition of non-convertible foreign (divisas)* holdings, will require a two thirds vote in favor of the Executive Council of the National Bank of Cuba, while the latter organization exercises the functions conceded to it as

the Board of Managers. See Article 15 of the Law-Decree.

2. - Obtain credit from banks, from other entities, from the public in general, and from the National Bank of Cuba, through the issuance of promissory notes, drafts, letters of credit or whatever other type of security or debt recognizance.

3. - Obtain from the National Bank of Cuba discounts, rediscounts, and advances with the guarantee of the appropriate (eligible) documents or with the (la generica de su cartera) assets from its portfolio. To this end, the National Bank of Cuba is authorized to make advance payments to the Cuban Bank of Foreign Trade in the amount and under precise terms to provide it with an available supply in cases of credits granted to countries without convertible monies, without limitation regarding term, and with the ability to buy back such balances. These operations will require the favorable vote of four members of the Executive Council of the National Bank of Cuba, which will fix the maximum limit of operations of this nature every six months that the Cuban Bank of Foreign Trade would be able to carry on, whatever the origin of its availabilities. (disponibilidades).

4. - To make investments, within or outside the national territory, in enterprises dedicated to the export, import and use of Cuban products; or in enterprises dedicated to the transport of Cuban goods abroad; or in enterprises which warehouse Cuban products, within or outside of the

national territory. In all these cases, the exact vote as per Clause 1) of this Article will be required.

5. - To issue, with prior approval of the Stockholders' Meeting and to negotiate quotable sureties in the Stock Market in cases outlined in the previous clause which represents:

a) The participation of the Cuban Bank of Foreign Trade in the capital of such enterprises.
b) Titles or bills with guarantees of the goods, businesses, concessions, and original fees, dues or taxes which affect them in a general or special way.
c) Bonds to the holder representing loans and credits for a term of no less than five years.
d) Titles, receipts or surety certificates that the Bank issues or controls abroad.

In relation to these sureties, the Cuban Bank of Foreign Trade will be able to buy them, sell them, give them as security, and agree to loans based on them. In all these cases, the voting as outlined in the preceding Clause 1) is required.

6. - To cooperate with the Government, the Provinces, the Municipalities, and autonomous organizations when deemed necessary and when required on its part by these institutions to carry out the importation of equipment, machinery and goods, making

use of those credits which the Bank may have abroad.

7. - To make advance payments and loans in relation to Cuban agricultural or industrial products, destined for foreign trade, or to acquire them, paying them in cash or on installment, adequately documenting the operation.

8. - To act as sales agent for Cuban products abroad, at the request of the producers or as direct seller of those which it might have acquired. See no. 7 of this same Article.

9. - To carry out the other operations which may result necessary or convenient for the fulfillment of the objectives outlined in Article 3 of this Law-Decree. See Clauses 7 and 8 above.

CHAPTER V

On Special Dispositions

Article 43. - The Cuban Bank of Foreign Trade will be able to initate and develop its activities without the necessity of deeded constitutional rules and by-laws and formalities and of inscription in any Register, given its character as an autonomous public credit entity whose constitutional ordinance will be this Law-Decree.

Article 44. - The Directors, functionaries and employees of the National Bank of Cuba, of the Cuban Bank for Agricultural and Industrial Development or whatever other

state credit institutions will be able to carry out duties provisionally and for a term of no more than three years with prior authorization of their respective directors of their organization, in the Cuban Bank of Foreign Trade without being governed in these cases by the incompatibilities which would affect them by existing legislation. See Clause 13) of Article 36 of this Law-Decree.

Article 45. - The bonds, Promissory Notes and Sureties representative of credits issued by the Cuban Bank of Foreign Trade referred to under Clause 5) of Article 42 will have the importance of national public sureties and will enjoy all the privileges and benefits which the laws give to same.

Said titles of credits and the rest of the sureties issued by the Cuban Bank of Foreign Trade will enjoy the exemption of all class of taxes, excise taxes, assessment or contribution in favor of the Government, Province, or Municipality; exemption which will extend to the documents representing them.

Also, capitals brought to Cuba to invest them in the acquisition of said sureties will be exempt from payment of the taxes on the export of same, in accord with that written in Law-Decree 548 of November 20, 1952.

The principal and the interest on the sureties referred to in the previous paragraph will be payable in the place and in

the money which the Cuban Bank of Foreign Trade and the holders of its sureties agree, in accord with the Fund for the Stabilization of Currency.

Article 46. - The transcriptions summaries and certifications of the bookkeeping books and the register of the Cuban Bank of Foreign Trade drawn up by the Secretary of the Institution under approval of the Managering Director will have the value of [legal] authentic documents. If they should be challenged in court, they will be verified by comparison with the corresponding original in the offices of the Cuban Bank of Foreign Trade.

Article 47. - The Cuban Bank of Foreign Trade will not have to lend nor will it be requested to post bond, or other type of surety in judicial or administrative proceedings whatever their nature in which it might have an interest or be a part.

Article 48. - The Cuban Bank of Foreign Trade will be able to agree on the signing of a contract with the National Bank of Cuba so that the latter may be in charge of its bookkeeping and administration.

CHAPTER VI

On Profits

Article 49. - Twenty-Five (25%) percent of the net profits of the operations of the Cuban Bank of Foreign Trade will constitute capital reserves. The remaining 75% will be distributed among its stockholders

without the distributed amount exceeding 10% of the nominal value of the stocks in circulation.

The resulting surplus after the aforementioned is covered, as well as the dividends corresponding to the Government shares, will be allotted in three parts:

1) To strengthen the amounts allocated to the Fund for the Guarantee of Minimum Prices in Agricultural Products and to the Cuban Institute of Technological Research;

2) To the Fund for the Development of the Bank of Industrial and Agricultural Development of Cuba; and

3) To the Municipal (no reproductivas) Works Fund of the National Finance of Cuba which will be created towards this end. The Board of Directors of the National Finance of Cuba will outline the rules under which this Fund will operate.

CHAPTER VII

On Inspection and Auditing

Article 50. - The Cuban Bank of Foreign Trade is subject to the inspection of the National Bank of Cuba and of the Accounts Court.

GENERAL DISPOSITIONS

First: The Cuban Bank of Foreign Trade, in accord with the policy of economic development carried out by the Government,

will not undertake operations of importation or of the financing of imports of products equal to, similar to, or substitutive of any which are produced in the country, orienting its activities fundamentally towards operations of acquisition and of the financing of the acquisition of capital goods (bienes de capital).

Second: The Bank will not carry out on national territory financing or investing operations in industrial enterprises which transform or produce the same, similar, or substitutive articles to those transformed or produced in the country, without being able to finance the increment of the established industrial enterprises, when the production may not be permanently sufficient to satisfy the demand of the national or world market, if they are not able to obtain the necessary resources from other public or private credit institutions.

FINAL DISPOSITION

Only: The quantity of five million pesos, product of the sale of the Veterans, Tribunals and Works Bonds 4% - 1953-1983 which, in accord with Clause 5 of Article 5 of the Law-Decree Number 1232 of December 28, 1953, is allotted to endow the respective capitals of the Cuban Bank of Foreign Trade, the Cuban Institute of Technological Research, and the Fund for the Guarantee of Minimum Prices in Agricultural Products, and which will be distributed in the following form:

1) The Cuban Bank of Foreign Trade: $3,5000.00
2) The Cuban Institute of Technological Research: $500,000.00
3) The Fund for the Guarantee of Minimum Prices in Agricultural Products: $1,000,000.00

See Article 49 of this Law-Decree.

TRANSITORY DISPOSITIONS

First: The Cuban Bank of Foreign Trade will receive as desposit for the Cuban Institute of Technological Research and the Fund for the Guarantee of Minimum Prices in Agricultural Products, the amount allotted for the capital of these entities, in accord with the Final Disposition above.

Second: The Cuban Bank of Foreign Trade will put the quantities representing their capital at the disposition of the aforementioned institutions when the Law-Decree organizing them is prescribed.

This Law Decree will commence to be in force five days after its publication in the Official Gazette of the Republic.

***

Cuban Resolution No. 127 of January 15, 1960

INTERVENTION OF THE CUBAN CANADIAN SUGAR COMPANY

(Official Gazette of January 25)

Whereas: Mr. Francisco Monne Serio, in his capacity as President of the Board of Directors of the entities, "Cuban Canadian Sugar Company, S.A.", owner and operator of the "Rio Cauto" Refinery, "Monne Industries, S.A.", owner and operator of an animal feed factory, and Commercial Company "Rio Cauto S.A.", owner and operator of the commercial establishment and other attached businesses, situated in the sugar mill town of above cited refinery, has offered for sale to the National Institute of Agrarian Reform, the industrial and commercial units pertaining to said companies.

Whereas: Mr. Francisco Monne has communicated to this National Institute of Agrarian Reform that due to the difficult economic situation confronting these entities, which find themselves unable to operate their industrial and commerical units fully.

Whereas: The situation of the Company, owner and operator of the "Rio Cauto" refinery, may cause an alteration in the production of sugar, causing economic disorders, and bringing with them possible labor conflicts; it is advisable that the national Institute of Agrarian Reform, in accord with the petition of Mr. Francisco Monne Serio, intervene in the mentioned entities until the studies which are being undertaken on the above mentioned proposition of sale, and that such an acquisition of the aforesaid units be carried out.

Whereas: One of the principal goals of the National Institute of Agrarian Reform is to

procure by all methods within its reach the effective functioning of all the industrial units closely related to the economy of the Nation.

Whereas: The first "apartado" of No. 48 Article of the Law of Agrarian Reform, authorizes the National Institute of Agrarian Reform to accord and put into practice whatever measures necessary to achieve the objectives of the aforementioned Law of Agrarian Reform.

Whereas: Using such authorization accorded the National Institute of Agrarian Reform, the following is decreed:

Resolution No. 127

First: Order the intervention by the National Institute of Agrarian Reform in the entities, "Compania Cubana Canadiense de Azucar, S.A.", in English, "Cuban Canadian Sugar Company", "Monne Industries, S.A.", and "Compania Mercantil Rio Cauto, S.A.", owners and operators respectively of the "Rio Cauto" Refinery, feed factory, commercial establishment, and other attached businesses, until the N.I.A.R. terminates the studies it is undertaking regarding the sale offer of Mr. Francisco Monne Serio, of the properties of said entities, and the acquisition of same is carried out, without entailing any obligation whatsoever on the part of the N.I.A.R. regarding the completion of the buy-sell study.

Second: Designate the General Administrator of Sugar Mills of the N.I.A.R. so that he may, using the authority conferred upon him by Resolution No. 97, of December 3, 1959, dictated by the N.I.A.R., direct all that concerning the direction, administration and operation of the aforementioned enterprises, as well as delegate authority to persons that he considers suitable, by designating towards such ends those who should assume said functions.

To be published in the "Official Gazette" of the Republic.

Given in Havana, on the fifteenth day of the month of January nineteen hundred and sixty. "Year of the Agrarian Reform".

BY THE NATIONAL INSTITUTE
OF AGRARIAN REFORM

Cap. Antonio Nunez Jimenez
Executive Director

Dr. Fidel Castro Ruz
President

Cuban Law No. 793 of April 25, 1960

MINISTRY OF THE TREASURY

I, OSVALDO DORTICOS TORRADO, President of the Republic of Cuba, do hereby make known that the following law has been enacted by the Council of Ministers and approved by me:

WHEREAS: The reorganization of the credit institutions of the State undertaken by the Revolutionary Government for the purpose of effectively serving the broad program of agricultural and industrial development of the nation, cannot be limited merely to those strictly concerning the internal production operations but must also consider the proper articulation of the State credit institution that has charge of the external banking and financial relations that make possible and facilitate an increase in the buyer markets of Cuban production and at the same time assure imports of the raw materials and equipment that they require and the consumer goods that cannot be produced in this country.

WHEREAS: For this purpose it is necessary to found a State banking organization with adequate autonomy and soundness, vested with sufficient power to meet the various contingencies of international trade and that it may have a well-trained management for the needs of the national economy in the process of expansion as well as of the projects and plans prepared by the Government to fulfil and overcome them.

WHEREAS: By Law-Decree No. 1425 of May 12, 1954 the overthrown regime created the bank entitled Cuban Foreign Trade Bank with a capital of $3,500,000.00 which the State subscribed and paid for with the

authorization of increasing said capital by $3,000,000.00 which should be subscribed by the banks members of the "Banco Nacional de Cuba" in the sum of $1,000,000.00 and by export industrial or agricultural merchants and producers in the sum of $2,000,000.00, none of which private subscription was ever effected.

WHEREAS: Inasmuch as the State is the only participant in the capital of said bank, as was provided in the second paragraph of Article 16 of said dictatorial Law-Decree, the statutory functions of the stockholders and of the Board of Directors of the Bank have been handled by the Board of Directors of the "Banco Nacional de Cuba", the former having become a department of the Central Bank with a probable decrease in the capacity for initiative and services it not being advisable that said structure be maintained.

NOW, THEREFORE: In pursuance of the powers vested in it, the Council of Ministers has resolved to enact the following

LAW No. 793

Article 1. An official autonomous credit institution for foreign trade is hereby founded and established under the name of "Bank of Foreign Trade of Cuba" with full juridical capacity and capital of its own, which shall be governed by the following

BY-LAWS

No. I - Name. The name of the Institution is Cuban Foreign Trade Bank (BANCO

PARA EL COMERCIO EXTERIOR DE CUBA); however it may be officially identified by the initials BANCEC. No other national or foreign commercial or credit institution may operate in Cuba using a like or similar name or initials which may lead to confusion. The "Banco Nacional de Cuba" is hereby authorized to suspend the operation of any company or concern that uses ambiguous initials or name until such interference is corrected.

No. II - Domicile. The central office of the Bank will be located in the capital of the Republic, at the place designated by its Governing Council but the institution may open agencies or branches abroad and may establish affiliated banking organizations subject to the legislation of the respective country.

No. III - Duration. The Bank is organized for an indefinite period of time counted from ten days following the publication of this law in the Official Gazette. It shall have juridical existence until it is liquidated, without the need of a formal registration or recording in any Registry in Cuba, in view of its status of public institution. In its foreign activities the respective local legislations will be observed.

No. IV - Capital. The capital of the Bank shall be Six Millions Pesos ($6,000,000.00); however, it may be increased by a national law.

The Cuban State shall subscribe and pay this capital as hereinafter provided in this law.

No. V - Profits and Reserves. Every six months a balance shall be taken as of the close of operations on June 30 and December 31 of each year. The profits shown thereby shall be considered as fiscal revenue and shall be deposited in the General Treasury of the Republic after deducting only such amounts as the Governing Council may set aside for capital reserves of the Bank, in the measure that they be essential for the proper operation of the Cuban Foreign Trade Bank.

No. VI - Auditor. The Auditor of the Bank shall be appointed by the Governing Council, under which he shall serve.

No. VII - Inspection. The BANCEC shall also be subject to inspection by the "Banco Nacional de Cuba" and the Board of Accounts.

No. VIII - Purpose and Powers. The Cuban Foreign Trade Bank is an organization designed to contribute to, and collaborate with, the international trade policy of the Government and the application of the measures concerning foreign trade adopted by the "Banco Nacional de Cuba".

In accordance with the such purposes the Bank shall:

a) Contribute to the equilibrium of the balance of payments in line with the accelerated economic development of the country;

b) Increase exports without affecting national supplies of raw materials and essential articles, and develop production of exportable goods, the

prices and demand of which may be convenient to the international market;

c) Promote exports of products that contain the maximum degree of manufacture;

d) Recommend that the exports of scarce and non renewable resources be prevented or limited;

e) Effect exports and imports in accordance with the volume, quality, price, origin or destination most convenient to the interests of the country;

f) Contribute to the greatest use of available foreign exchange and to the rational use of Cuba's foreign credit without compromising inconveniently the country's capacity for payment;

g) See to the better specifications of quality and other standards that will govern our export and import trade;

h) Act as the sole exporter and importer of products or regions when so advised by reasons of national convenience;

i) Contribute to the coordination of the foreign trade policy with the policy of economic development;

j) Promote a diversification of foreign markets and of products for a progressive and sound development of the Cuban foreign trade;

k) Improve, promote, stimulate, assure, orient and develop the foreign trade of Cuba, consolidating and opening markets for Cuban production directly or through third parties, and acquiring or facilitating the acquisition of such foreign products as may be necessary or convenient for the supply and expansion of the national economy.

No. IX - Operations. In order to fulfil the objectives mentioned in the preceding section the Cuban Foreign Trade Bank may:

a) Collaborate with its technical and financial assistance to make feasible in foreign markets the plans adopted by the Revolutionary Government or the "Banco Nacional de Cuba" for the expansion of commercial interchange or directly to carry forward the pertinent operations.

b) To buy in the country and sell abroad all kinds of national agricultural, industrial or mining products, for cash or on instalments, to finance and grant loans and advances to national concerns or organizations that produce or may produce for foreign markets or which should place their surplus production therein.

c) To purchase all kinds of products in foreign markets and sell them in the country directly or through its own agencies or concerns in which it may participate, or even through commission merchants, acting in their own name or in the name of others, that it may appoint; make such exports and imports as the Government may decide to carry on an exclusive basis.

d) Study, promote and engage in exchange or compensation operations considered feasible or convenient, whether it be in an effort to obtain markets for exportable surpluses that are hard to sell abroad, or for other causes.

e) Create affiliated companies abroad as well as to participate in the capital of other concerns that are engaged, within or without the national territory in the import trade of raw materials, equipment and machinery or merchandise of popular consumption when thus recommended by the Government, or in the exportation or transformation or use of Cuban products, or in the high seas carriage of Cuban or foreign merchandise intended for the national market.

f) Grant credits or make investments for the development of the foreign trade of the nation, the production of exportable goods or goods the importation of which may be

detrimental to the national economy, and, in general, to engage in all manner of active banking operations.

g) Receive sight or time deposits, accept documents for its own account or for account of third parties, borrow money on loan from public or private banks and from national or foreign private individuals, and, in general, engage in all sorts of passive banking operations.

h) Buy, sell, pledge or encumber in any legal way, real estate, precious stones or metals, whether or not coinable, foreign coins and exchange, credits, rights, commercial paper, bonds, stocks, debentures and public or private securities, in Cuban or foreign currency.

i) Buy, sell, lease or take in leasehold, mortgage or accept mortgages and discharge them, or otherwise lawfully dispose of real property or personal property considered as realty under other legislations, such as vessels and floating dry docks or other similar facilities.

j) Issue and place bonds, debentures, titles, certificates of participation or other securities negotiable on the Stock Exchange, with the generic security of the assets of the Bank or the specific security of certain credits, paper,

securities, properties, business, concessions or rights, or any participation therein, or the Bank's interests in specific concerns, and to call in such securities, resell, pledge or accept them as security or in payment of loans and obligations.

k) Grant credits in transactions with countries with non-convertible currencies, within the amount of the advances that may be granted it for that purpose by the "Banco Nacional de Cuba".

l) To open and close current accounts or other monetary deposits in national currency or foreign exchange at the "Banco Nacional de Cuba" or in foreign banks, within or without the national territory; place monetary funds or securities on special deposit or guarantee, provide sureties or guarantees for its own obligations or those of others, without mortgage security or with the pledge of credits, commercial paper, merchandise, rights, or other assets, or on mortgage if the property is real property; and to accept balances, funds or securities of other national or foreign banks, within or without the nation, surety bonds, properties or personal or guarantees in rem with which obligations and commitments are insured.

m) Discount and rediscount at the "Banco Nacional de Cuba" and obtain from it advances with the specific guarantee of eligible documents with the generic security of its portfolio, or with sufficient guarantee of products. The credit policy with the Cuban Foreign Trade Bank may be decided upon by the "Banco Nacional de Cuba" on the vote of three State Directors of its Board of Directors.

n) Draw, endorse, accept or guarantee bills of exchange, drafts, checks, promissory notes to order or other commercial paper; to negotiate and issue letters of credit whether confirmable or not, and sign all manner of public or private contracts covering the loans that it receives or other indebtedness, obligations or active or passive commitments.

o) To engage in any activity of international trade, involving credit or finances compatible with its objectives and functions, even though not expressed in the preceding sections.

p) To decide upon its budgets and plans for investment and operations.

No. X - Government and Management. The Bank shall be governed and managed by its Governing Board and its General Manager.

No. XI - The Governing Board. The Governing Board is the supreme body of the Bank and is vested with the broadest powers to dispose of its personal and real properties, and to authorize and provide those that are assigned by these By-laws to other administrative organs; and it shall be presided ex-officio by the President of the "Banco Nacional de Cuba" and shall be composed of a Delegate of the Minister of Commerce, a Delegate of the Minister of Economy, a Delegate of the National Agrarian Reform Institute (INRA) and a Delegate of the Department of Mines and Petroleum of the Ministry of Agriculture.

The Governing Board shall:

1. Resolve on the credit policy to be followed by the Bank in foreign markets.

2. Resolve on the policy of purchases and sales and establish the quantitative, generic or specific limitations that the General Manager should adhere to according to the nature of the transactions and in view of the nature of the products and the orientation or regional source of the trade.

3. Decide upon or, in lieu thereof, approve or change the budgets and the investment plans and operations prepared by the General Manager.

4. Apply to the "Banco Nacional de Cuba" for lines of credit and global advances for the operations of the Bank.

5. Appoint, remove and replace the General Manager. The appointment may be for an indefinite or a fixed period of time.

6. Appoint and remove the Secretary of the Bank who, shall also be the Secretary of the Governing Board.

7. Appoint and remove the Auditor who is to audit the accounting.

8. To hold a regular meeting once a month and special meetings whenever requested by the President of the Governing Board on his own initiative or at the suggestion of the General Manager.

9. To request the General Manager to take the final cognizance and decision of any matter which, due to its importance or amount requires the intervention of the Board.

10. To establish the limits of the jurisdiction of the General Manager as well as regarding the use of the bank's signature by the officers.

11. To decide the consultations of the General Manager.

12. To approve the issues of quotable securities and paper.

13. To decide on the appeals that affected parties may establish against decisions of the General Manager.

14. To approve the internal regulations issued by the General Manager.

15. To approve the semi-annual balance sheet and if necessary to order the setting up of reserves on account of profits.

16. To decide on all matters provided in the objectives of the Bank when not done by the General Manager or does not fall within his jurisdiction.

17. To meet as a Liquidation Board in the event of the liquidation of the Bank and to place at the disposal of the State any active balance resulting after the liabilities have been paid.

No. XII - Quorum and Majority. The regular and special meetings will require a quorum of three members of the Board and resolutions shall be adopted in all cases by at least three affirmative votes.

No. XIII - The Members of the Board. The members of the Board shall not have direct administrative functions in the business of the Bank, except to act on the Board by means of resolutions. Exception is made of the President who may have the initiative in all matters under the terms of this Organic Statute and shall decide whether to sign or subscribe to the minutes or documents, public or private, in the name of the Bank, that contain negotiations of public or economic importance.

No. XIV - The President. The President of the Board who shall also be the President of the Bank, shall be the social and legal representative of the Bank, and shall discharge these duties continuously and lawfully through the General Manager, except in the event that he should reserve to himself specifically the personal exercise of said functions. He shall have the following powers:

a) Call and preside over the meetings of the Governing Board.

b) Authorize the certificates issued by the Secretary regarding resolutions and minutes of the Board, by his attestation.

c) Appoint the member who is to take his place as President at the meetings of the Board in cases of absence of disability.

d) Through the General Manager to supervise the organization and operation of the Bank's offices.

No. XV - The Secretary. The Secretary shall be appointed by the Governing Board and his position shall be one of trust, and it shall be his duty:

a) Issue the notices for the regular and special meetings of the Governing Board, attending the meetings without any voting right.

b) Draw up the minutes of the meetings, enter them in the respective books and to have the custody thereof, carefully keeping them.

c) Issue certificates regarding the resolutions adopted by the Board, with the attestation of the President.

d) To advise the Board on legal matters as counsel of the Board.

e) Direct the legal department which is to assist him in matters regarding the various departments and offices of the Bank.

No. XVI - The General Manager. The General Manager is, as regards third persons, the official representative of the Bank by legal delegation of the President, except in cases where the President reserves the decision on matters for himself. He shall preside over the Advisory Administrative Committee which will function regularly for the proper handling of the operations of the Bank and shall be composed of the Managers of the Bank and other officers designated by the Governing Board and shall directly manage all matters, business and offices of the Bank. He shall sign, together with another authorized officer, the contracts and obligations that may be entered into by the Bank, whenever the Governing Board has not appointed express representatives for that purpose. In case of absence or impediment he shall be substituted by the Manager appointed by the Governing Board. He may be appointed for an indefinite period of time subject to revocation by the Board or under a temporary service contract. The General Manager shall also:

a) Decide upon all operations and business included among the objects of the Bank within the quantitative or other limitations that may be imposed by the Board, admitting or giving the personal or in rem guarantees provided by this law and fully binding the

institution in all cases in which the Board has not reserved the matter for its own decision.

b) Organize the banking offices in accordance with the instructions given by the Board, appointing the trained personnel required to serve them, on the basis of preparation and training. In the case of the appointments of Managers and other officers having great responsibility within the Bank, they shall be made with the knowledge and approval of the President of the Bank.

c) To decide upon and submit to the Board regulations for the general operations or for special services.

d) Decide upon powers of attorney for litigation or for business, appointing the attorneys in fact and revoking such appointments, all in accordance with the President.

e) Authorize and revoke the use of the Bank signature by the officers, requiring the concurrence of the signature of two of them in all cases in accordance with the principle of double control, according to their respective rank in relation to the amount of the business, in order to bind the institution.

f) To prepare the operating and investment budgets, submitting them to approval by the Board.

g) To present statements and balance sheets of the operations of the Bank to the Board, from time to time.

h) To submit initiatives and consultations to the decision of the Board and keep it regularly and properly informed, as well as the President, of the activities of the Bank and of its important operations.

i) Fulfil and see to the fulfilment of the By-laws and Regulations of the Bank and the resolutions of the Board.

No. XVII - The Managers. The Managers shall be at the head of the principal departments of the Bank. They may use the signature together with another authorized officer in business transactions ordered by the General Manager. One of them shall be the alternate of the General Manager, on appointment by the Board.

No. XVIII - The other officers and employees of the Bank shall be appointed by the General Manager acting in conformity with the President, following the standards that the latter may establish, with the approval of the Governing Board.

Article 2. Commencing on the effective date of this law the purchases abroad of equipment, machinery, raw materials or merchandise of all kinds contract for by the State, the autonomous organizations or other offices of the State, the provinces

or the municipalities as well as their banking, financial and exchange operations shall be handled exclusively by and through the Cuban Foreign Trade Bank which, in the future, shall act as the central import office of the State, of the autonomous organizations and of other State, provincial or municipal offices.

In qualified cases and when thus required by national interest some imports may be excluded from the provisions of this Article, provided it is expressly decided by the Council of Ministers.

Article 3. Payment by the Cuban Foreign Trade Bank of all kinds of assessments, taxes, stamp taxes and levies of a fiscal nature, Customs or tariff, arising from operations of imports, exports and any other acts of lawful commerce that it may effect by itself or in the name of third persons, shall be made in the manner, in the periods and dates ordered by the Minister of the Treasury and said Bank by an agreement they shall sign for such purpose.

Article 4. The extinction of the State autonomous organization created by Law-Decree No. 1425 of May 12, 1954 of the overthrown regime, published in the Official Gazette, Special Edition of May 13, 1954 is hereby ordered. Its dissolution shall take full effect ten days following the publication of this law in the Official Gazette.

Article 5. The capital of $3,500,000.00 of the former Cuban Foreign Trade Bank paid for by the State pursuant to the Law-Decree whereby it was created is hereby transferred to the capital account of the "Bank for

the Foreign Trade of Cuba" (Cuban Foreign Trade Bank), said amount being conveyed in the sum of $3,500,000.00 being the capital assigned by the State to the Cuban Foreign Trade Bank.

Likewise there is transferred for account of the State to the Cuban Foreign Trade Bank, $2,500,000.00 of the balance standing in favor of the State on the Account of New Resources of the former Bank for Social and Economic Development (BANDES) thus making up the capital of $6,000,000.00 mentioned under Section IV of Article 1 of this law.

Article 6. All the assets and liabilities of the former Cuban Foreign Trade Bank are hereby transferred to the new Cuban Foreign Trade Bank. As legal successor thereof the Cuban Foreign Trade Bank is subrogated to all the rights of action and claims and takes over all the contractual or extracontractual obligations and responsibilities of the former Cuban Foreign Trade Bank, strictly respecting the lawful rights of third contracting parties, whether national or foreign and whether within or without the national territory.

The transfer of the assets and liabilities shall be effective ten days following the publication of this law in the Official Gazette.

Article 7. All the equipment, real estate, furniture, furnishings, files, books, portfolio, documents and other appurtenances used or held as owner or otherwise by the former Cuban Foreign Trade Bank are

transferred to the Cuban Foreign Trade Bank.

The properties or rights which, by their nature, according to law, are registered in private or public registries shall be understood to be fully transferred from the effective date of this law, it not being necessary that any formal notation be made of the transfer, the Cuban Foreign Trade Bank being able directly to exercise and enforce the rights and claims thereof as the legal successor of the former Cuban Foreign Trade Bank, without any special formality whatever.

Matters that are governed by foreign laws in which the Bank must fulfil the local legislation on the principle of "locus regit actum" are expected from the foregoing.

Article 8. The central offices and the offices of agencies, dependencies or affiliates of the former Cuban Foreign Trade Bank are hereby incorporated in the Cuban Foreign Trade Bank, the latter to continue attending to the matters under their jurisdiction with its present personnel until otherwise ordered by the Governing Board, and in its representation by the General Manager. The powers of attorney that are being used in litigation as well as out of court and the authorizations of using the signature shall continue in full effect as if they had been conferred and issued by the successor Bank, until revoked by the Governing Board.

Article 9. Within ten days following the publication of this law, the "Banco

Nacional de Cuba" shall proceed to transfer to the account of Cuban Foreign Trade Bank the debit or credit balances and the accounts which it keeps in the name of the former Cuban Foreign Trade Bank, including, after the final annulment of the Certificate representative of 35,000 shares of $100.00 each, the items mentioned in Article 5 of this law, and it shall instruct the General Manager of the Bank as to the coordination of the accounting of the business between both institutions.

Article 10. All laws or other provisions of a general or special nature that conflict with this law, and specially Law-Decree No. 1452 of May 12, 1954, with regard to the former Cuban Foreign Trade Bank, are hereby derogated.

Article 11. This law shall take effect ten days following publication in the Official Gazette of the Republic.

Done at the Presidential Palace, in Havana, on this 25th day of April, 1960.

OSVALDO DORTICOS TORRALDO

Fidel Castro Ruz, Prime Minister.

Rolando Diaz Aztarain, Minister of the Treasury.

(Official Gazette No. 85, of May 4, 1960).

Cuban Law No. 851 of July 6, 1960

LAW OF NATIONALIZATION NO. 851

MINISTRY OF THE TREASURY

I, Dr. Osvaldo Dorticos Torrado, President of the Republic of Cuba, do hereby make known that the Council of Ministers has enacted and I have approved the following legislation:

WHEREAS, the attitude assumed by the government and the Legislative Power of the United States of North America, which constitutes an aggression, for political purposes, against the basic interests of the Cuban economy, as recently evidenced by the amendment to the Sugar Act just enacted by the United States Congress at the request of the Chief Executive of that country, whereby exceptional powers are conferred upon the President of the United States to reduce the participation of Cuban sugars in the American sugar market as a threat of political action against Cuba, forces the Revolutionary Government to adopt, without hesitation, all and whatever measures it may deem appropriate or desirable for the due defense of the national sovereignty and protection of our economic development process.

WHEREAS, Article 24 of the Fundamental Law of the Republic authorizes the forced expropriation of property, leaving it to the ordinary laws to confer authority and competent jurisdiction to decree the expropriations and to regulate the procedure for the accomplishment thereof and the means and terms for the payment of the expropriated property.

WHEREAS, it is advisable, with a view to the ends referred to in the first Whereas of this Law, to confer upon the President and the Prime Minister of the Republic full authority to carry out the nationalization of the enterprises and property owned by physical and corporate persons who are nationals of the United States of North America, or of enterprises which have majority interests or participations in such enterprises, even though they be organized under the Cuban laws, so that the required measures may be adopted in future cases with a view to the ends pursued.

NOW, THEREFORE: In pursuance of the powers vested in it, the Council of Ministers has resolved to enact and promulgate the following:

Law No. 851

Article 1. Full authority is hereby conferred upon the President and the Prime Minister of the Republic in order that, acting jointly through appropriate resolutions whenever they shall deem it advisable or desirable for the protection of the national interests, they may proceed to nationalize, through forced expropriation, the properties or enterprises owned by physical and corporate persons who are nationals of the United States of North America, or of the enterprises in which such physical and corporate persons have an interest, even though they be organized under the Cuban laws.

Article 2. In the resolutions providing for the expropriations the President and the Prime Minister of the Republic shall declare the necessity, public utility and national interest justifying such action.

Article 3. The President and the Prime Minister of the Republic shall also designate in the resolutions above referred to in Article 1 of this Law, the persons or agencies that shall have charge of the administration of the properties or enterprises expropriated hereunder.

Article 4. Once the expropriation of a property has been consummated and the administration thereof taken over by the person or agency designated therefor, the President and the Prime Minister of the Republic shall appoint appraisers of their election to determine the value of the expropriated property for the purposes of the payment thereof, which shall be effected as provided in the following article.

Article 5. They payment for the expropriated property shall be made, after the due appraisal thereof, in accordance with the following rules, to wit:

a) The payment shall be made in Bonds of the Republic, which will be issued for that purpose by the Cuban State and shall be subject to the terms and conditions set forth in this Law.

b) For the amortization of said bonds, and by way of security therefor the Cuban State shall set up a sinking fund which

shall be fed annually with twenty-five per cent (25%) of the foreign exchange corresponding to the excess of the purchases of sugar made in each calendar year by the United States of North America over and above Three Million (3,000,000) Spanish Long Tons, for their domestic consumption, at a price of not less than 5.75 cents of a dollar per English pound (F.A.S.). To this end the National Bank of Cuba shall open a special dollar account which shall be captioned "Fund for the Payment of Expropriations of Properties and Enterprises of Nationals of the United States of America".

c) The Bonds shall draw at least two percent (2%) annual interest, which shall be paid only and exclusively out of the fund to be set up and fed pursuant to Rule b).

d) Such annual interest as cannot be paid out of said Fund referred to above in Rule b) shall not be cumulative, but the obligation to pay it shall be deemed extinguished.

e) The Bonds shall be amortized in a period of not less than thirty (30) years counted from the date on which the expropriation of the property or enterprise involved is actually consummated, and the President of the National Bank of Cuba is hereby authorized to determine how and to what extent they will be amortized.

Article 6. The resolutions jointly issued by the President and the Prime Minister of the Republic in the forced

expropriation proceedings instituted hereunder may not be appealed, as no remedial action shall be available there against.

Article 7. The Minister of the Treasury is hereby directed to issue, in the name and behalf of the Cuban State, the bonds with which the property expropriated hereunder will be paid for.

Article 8. This law supersedes all and whatever legal and statutory provisions may be repugnant hereto, or may conflict with the enforcement hereof, and shall become operative from the date of its publication in the Official Gazette of the Republic.

NOW THEREFORE: I hereby order that this law be fully and strictly observed and enforced.

Done at the Presidential Palace, in Havana, this 6th day of July, 1960.

OSVALDO DORTICOS TORRADO
President

Fidel Castro Ruz, Prime Minister.
Rolando Diaz Aztarain, Minister of the Treasury.

Contract No. 556 of August 12, 1960

BANK OF CUBA FOR FOREIGN TRADE
Calle 23 No. 171-173, 10th Floor
Havana, Cuba

Havana, August 12, 1960

BUYER: BANK OF CUBA FOR FOREIGN TRADE

SELLER: NATIONAL INSTITUTE OF AGRARIAN REFORM

Today Seller sold to Buyer:

1. QUANTITY: TWO HUNDRED THOUSAND (200,000) bags, each containing 100 lbs. net of animal feed sugar, manufactured in the Cauto River Central,* packed in bags of 6 sheets of paper in good condition and in loose grain at time of shipping.

2. PRICE: At the price of THREE PESOS AND TWENTY-FIVE CENTS ($3.25) per bag, free at shipside in the port of Antilla, less 1/2% commission.

3. SHIPMENT: For shipment by one or more ships which Buyer will assign for loading during the months of August and September, 1960.

4. FREIGHT: Buyer advise Seller no less than seven days in advance of arrival of ship for loading and ships will take sugar as fast as possible, but Seller will deliver no less than 750 tons per day, working days, excepting bad weather, Saturdays after midday, Sundays and holidays, if not, cost of such demurrage will be paid by Seller in accord with Contract of Freightage. If sugar can be delivered faster than the

*Refinery

above-stipulated, the rapid expedition thus gained will be in benefit of Seller.

5. LIQUIDATION: The invoices of Seller covering each shipment will be calculated on the base of the weights determined in port of shipment (Cauto River Central).

6. MARITIME INSURANCE: This insurance will be responsibility and at risk of Buyer, from coast to coast, including any risks to sugar while on shipboard or lighters anchored in port, at times of loading or unloading, or while awaiting arrival of steamships designated to transport it, without the obligation of Buyer in respect to these risks extending more than the seven days prior to the date fixed for the arrival of each ship.

7. SUPERIOR FORCE: Case in which, by strike, war, rebellion, insurrection, political disturbances, or civil commotion, in the Republic of China, delivery of all or part of the sugar sold under this contract should be delayed or impeded directly or indirectly, Seller will notify Buyer and the latter will have the option either of canceling the contract for the quantity for which delivery was impeded or delayed, or of receiving the sugar at the price of the contract as soon as it can be delivered. Buyer will notify Seller if he exercises this option or not within five working days following receipt of pertinent notice. In case Buyer opts to receive the sugar, Seller will make all possible effort to deliver it as soon as possible, but if in spite of such effort, it shall not have been delivered in total or in part sixty days

after the last day granted Seller for shipment, the contract will be considered null and void regarding the quantity not delivered. Seller must present satisfactory proofs within a prudential time period regarding cause of delay or obstacle, if such is demanded by Buyer.

8. TAXES: All contribution or tax established or which may be established in the future by the State, Province, or Municipality, or any Government agency, on the sugar sold under this contract or upon its sale, will be accountable to Seller, and the only quantity which may be attributed to Buyer will be that of the agreed price of this contract.

9. This sugar will be exempt of all captation or retention established or which may be established in the future by the Cuban Institute of the Stabilization of Sugar, by the Government or any Government agency, and Seller commits himself to the delivery to Buyer of sugar that is freely available for the total bought.

AGREED:

NATIONAL INSTITUTE OF AGRARIAN REFORM

AGREED:

BANK OF CUBA FOR FOREIGN TRADE

Cmdte. Alberto Mora
General Administrator

Contract No. 555 of August 12, 1960

BUYER: CUBAN CANADIAN SUGAR CO., INC., 551 Fifth Avenue - Suite 12, New York 17, N.Y.

SELLER: BANCO PARA EL COMERCIO EXTERIOR DE CUBA, Havana, Cuba.

The Seller has this day sold to the Buyer:

1.-QUANTITY: TWO HUNDRED THOUSAND (200,000) bags, containing each 100 pounds net of animal feed sugar, manufactured at Central de Conte, Cuba, packed in 6 ply paper bags in sound condition, sugars to be free flowing at time of shipment.

2.-PRICE: At the price of THREE DOLLARS AND TWENTY FIVE CENTS (US$3.25) per bag, Free Alongside Ship at the port of Antilla, Cuba.

3.-SHIPMENT: Shipment to be made by vessel/s to be assigned by Buyer to load during the months of August/September 1960.

4.-LOADING: Buyer shall give Seller notice at least seven days in advance of expected readiness to load, and Seller shall declare port/s of loading not later than 6 days before vessel/s expected arrival at first loading port. Vessel/s are to receive sugars as fast as possible and the Seller is to supply cargo to vessel at the average rate of 750 long tons per weather working day, Sundays, Saturday afternoons and holidays excepted, in default of which demurrage is to be paid by Seller at Charter Party rate. If the sugar

be delivered faster than the above rate, dispatch earned at Charter Party rate to be for account and benefit of Seller.

5.-PAYMENT: The Buyer shall establish not later than August 19th, 1960 an irrevocable Letter of Credit in favor of Seller, through a first class New York Bank, covering the full value of the sugars sold under this contract, available without discounts of any kind against first presentation of shipping documents, which shall consist of:

Full set of Bills of Ladings,
Original and five copies of Seller's Commercial Invoice,
Original and five copies of U. S. Consular Form.

The Letter of Credit shall permit partial shipments.

6.-SETTLEMENT: The Seller's invoices covering each shipment shall be calculated on the basis of the weights established at the producing point (Centra Rio Conte).

7.-MARINE AND WAR RISK INSURANCE: Marine and War Risk Insurance from warehouse to warehouse including loading and discharging and lighter and craft risk at Cuban port/s while awaiting arrival of vessel assigned to transport the sugar but attaching not more than seven days prior to the due date of arrival of said vessel shall be effected by the Buyer at his expense with Lloyd's and/or First Class Insurance Companies as per Rule 186 and Appendix 1 of the Sugar Association of London. If so requesed Buyer to give Seller -- evidence prior to

vessel's arrival of having complied with the provisions of this clause.

8.-FORCE MAJEURE: Should delivery of the sugar sold under this Contract, in whole or in part, be prevented or delayed directly or indirectly by any cause of Force Majeure, Fire, War, Strikes, Rebellion, Insurrection, Political Disturbances, Civil Commotion, Riots in the Republic of Cuba, Seller shall notify Buyer and Buyer will have the option of either canceling the contract for the quantity whose delivery has been prevented or delayed or of taking the sugars at contract price as soon as they can be delivered. Buyer shall notify Seller if he is willing or not to exercise this option within the five working days following date of receipt of said notification. Should the Buyer decide to receive the sugars, Seller will make every effort to deliver same as soon as possible, but if in spite of this the sugars are not delivered in whole or in part sixty days after the last day granted by the Buyer for its shipment, this contract shall be considered null as far as the quantity not delivered. Seller shall present within reasonable time satisfactory evidence of the cause of prevention if requested by Buyer.

9.-TAXATION: a) Any taxes or levies in the nature of taxes which may be imposed on this sugar by the country of destination shall be for account of Buyer.
b) Any taxes or levies in the nature of taxes which may be imposed by the country of origins shall be for account of Seller.

10.-EXEMPTION: The sugars sold under this Contract are free (are Exempt) of seizure or retention present or future, by the Sugar Stabilization Institute or the Government or any agency or instrumentality thereof and the Seller undertakes to deliver to Buyer sugar of free availability for the total quantity purchased.

11.- GUARANTEES: The Buyer guarantees that the sugars bought under this contract shall be destined for animal feeding and under no circumstance for human consumption. To that effect Buyer shall establish, not later than August 19th, 1960, a guarantee in either of the following manners:

a) A written guarantee from Mr. Francisco Monne Serio.
b) A bond from a first class U.S. or Canadian Bonding Company.

In any case the guarantee shall be for an amount of U.S. $2.00 per bag payable to the Seller by the guarantor upon presentation of factual evidence that any bag or bags of the sugars sold under this contract have been diverted to normal consumption.

ACCEPTED:

CUBAN CANADIAN SUGAR
SUGAR COMPANY INC.

A. Clayton Schafield
Vice President

ACCEPTED:

BANCO PARA
EL COMERCIO EXTERIOR
DE CUBA

Chete. Alberte Iebra
General Manager

Cuban Resolution No. 2 of September 17, 1960

Resolution No. 2

Whereas: Law No. 851 of July 6, 1960, published in the Gaceta Oficial of July 7, authorized the undersigned to order jointly, whenever they consider it necessary to the defense of the national interest, the nationalization, by means of expropriation, of the assets and companies owned by natural or juristic persons who are nationals of the United States of America, or of companies in which the said persons have an interest or participation, even though the said companies were constituted in accordance with Cuban laws.

Whereas: It is not possible to allow a large share of the nation's banking to remain in the hands of the imperialist interests which, in an act of cowardly and criminal aggression, inspired the reduction of our sugar quota.

Whereas: Subsequent to the reduction of the sugar quota, the Government of the United States of America and the representatives of monopolistic interest of that country repeatedly committed acts of open aggression against the Cuban economy, such as those involving the curtailment of trade between the two countries, which had the obvious purpose of hampering the economic development of Cuba; and the imposition of embargoes on commercial aircraft owned by Cuban companies, under the legal guise of claims against civil debts, but which have the implicit purpose of curtailing our vital means of international communication, in an increasingly greater effort to isolate our country.

Whereas: One of the most efficient instruments of that imperialistic interference in our historical development has been typified by the operations of the American commercial banks, which have served as a financial vehicle, to facilitate the monopolistic activities of the American companies in Cuba and the massive invasion of our country by imperialistic capital through usurious loans, which, far from promoting our economic growth, brought about in times of emergency numerous lawsuits resulting in the seizure of our national wealth by that imperialistic capital.

Whereas: It has always been the financial policy of these banks to encourage the activities of the American companies that devote their efforts to the procurement of our natural resources, the exploitation of our land by holders of large estates, and the mercantile operations that have contributed to the growing trend toward importing American manufactured goods, to the extent that it has hindered the development of national industries and has forced our economy to become dependent on a single crop and a single export.

Whereas: All this proves that the activities of American banks in Cuba have been a decisive factor in the disruption of our economic structure.

Whereas: It is unquestionable that the continuation of American banking interests in Cuba, a typical example of the imperialistic phenomenon, constitutes an obstacle to national liberation.

Whereas: In addition to the facts already stated, there is the deliberate practice of the United States Government designed to facilitate and to encourage, within its own territory, counterrevolutionary activities by war criminals and fugitive traitors.

Whereas: Furthermore, the work of international espionage in Cuban territory has been intensified under the sponsorship of that Government, with notorious contempt for international law and with the obvious intention of promoting conspiratorial activities in our country.

Whereas: All these acts are undertaken for the purpose of destroying the great achievements of the Cuban Revolution, in the wicked hope of again subjecting our country to imperialistic oppression.

Whereas: We the undersigned realize that we should exercise the authority vested in us, and that we should proceed, in responsible discharge of the revolutionary duty, to nationalize all the American banks operating in our country, thus advancing still further on the road undertaken by our people, with firm patriotic will, toward the total economic independence of our nation.

Now, therefore: Exercising the authority vested in us, in accordance with the provisions of Law No. 851 of July 6, 1960,

WE RESOLVE:

First: To order the nationalization, by expropriation, and consequently, award to the Cuban Government, in absolute ownership, all the assets, rights and shares deriving from the utilization thereof, especially the banks, including all their branches and agencies located in Cuba, which are the property of the following legal persons:

1. The First National City Bank of New York

2. The First National Bank of Boston

3. The Chase Manhattan Bank

Second: Accordingly, the Cuban State is hereby declared subrogated in the place and stead of the natural or juristic persons listed in the preceding paragraph with respect to th above mentioned property, rights, and rights of action, and to the assets and liabilities forming the capital of the above mentioned companies.

Third: It is hereby declared that these expropiations are carried out for the reasons of public necessity and national interest stated in the "Whereas" clauses of the present Resolution.

Fourth: Pursuant to Article 3 of Law No. 851 of July 6, 1960, the President of the National Bank of Cuba is assigned to take over, with all the authority inherent in his office, the administration of the assets and banking businesses which are the

subject of the action decreed in the present Resolution.

Fifth: The President of the National Bank shall designate officers of his own choosing to administer, on his behalf, the said assets and business, with no limitation whatsoever, including those of the branches or agencies of the banking institutions, and after taking over the said administration they shall notify the undersigned, who shall then assign experts to estimate the value of the confiscated assets with a view to payment thereof in the manner prescribed in Law No. 851 of July 6, 1960.

Sixth: It is hereby declared, for the purposes of the provisions of Article 23 of Law No. 13 of December 23, 1948, which created the National Bank of Cuba, that as a result of the expropriation ordered in this Resolution, the Council Member appointed by the Foreign Banks shall cease to represent the nationalized banks in the Council without prejudice to the representation therein of other foreign banks not affected by the present Resolution.

Seventh: The President of the National Bank of Cuba is hereby authorized to issue the pertinent notices to the legal representatives of the juridical persons affected, and to carry out the provisions of the present Resolution.

Eighth: As a result of the adjudication in favor of the Cuban Government of the businesses, assets, rights and shares referred to in the present Resolution, the

President of the National Bank of Cuba is hereby authorized to issue the pertinent directives to the Registrars of Property, Corporate and Mercantile Deeds in order that the proper entries may be made in their registers.

Done at Habana on September 17, 1960.

Osvaldo Dorticos Torrado
President

Fidel Castro Ruz
Prime Minister

Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

BANCO PARA EL COMERCIO EXTERIOR DE CUBA,

Plaintiff

v. COMPLAINT

THE FIRST NATIONAL CITY BANK OF NEW YORK,

Defendant

- - - - - - - - - - - - - - - - - - - x

Plaintiff, complaining of the defendant, by its attorneys, Rabinowitz & Boudin, alleges:

1. Plaintiff is a corporate body organized and existing under the laws of the Republic of Cuba and having its domicile in the City of Havana, Cuba.

2. Defendant The First National City Bank of New York is a national banking association duly organized under the laws of the United States of America, having its domicile in the City and State of New York and being a citizen of said State.

3. The jurisdiction of this Court is invoked under Title 28, U. S. C. 1332, in that plaintiff is a foreign corporate body and the defendant is a citizen

of the State of New York. The amount in controversy exceeds the sum of $10,000.00, exclusive of interest and costs.

4. Heretofore and on or about August 12, 1960, the plaintiff entered into a contract in writing with Cuban Canadian Sugar Company, Inc. (hereinafter referred to as Cuban Canadian), whereby plaintiff sold and Cuban Canadian purchased 200,000 bags of sugar of about 100 lbs. each at the price of $3.25 per bag, free alongside ship at a port in Cuba, for which Cuban Canadian agreed to pay by the establishment, no later than August 19, 1960, of an irrevocable letter of credit in favor of plaintiff through a New York bank, covering the full value of the sugar so sold.

5. Thereafter and on or about the 18th day of August, 1960, Cuban Canadian procured from and caused to be delivered to the plaintiff a letter of credit of the defendant in the sum of $650,000.00 in favor of the plaintiff, payable against delivery of sight drafts and invoices with bills of lading attached, covering up to 200,000 paper bags of sugar at $3.25 per bag, whereby the defendant promised to and agreed with the plaintiff that the defendant would pay to the plaintiff, upon presentation, the plaintiff's draft or drafts drawn on the defendant for a sum not exceeding $650,000.00, accompanied by appropriate invoices and bills of lading. A copy of said letter of credit is annexed hereto as Exhibit A.

6. Thereafter, after the receipt by plaintiff of said letter of credit, the

plaintiff, in reliance on the terms thereof, proceeded to perform its said contract with Cuban Canadian and to ship 66,846 bags of sugar from Cuba to Pascagoula, Mississippi, on board the S.S. Aenos.

7. The plaintiff duly performed all the conditions of its contract with Cuban Canadian on its part to be performed.

8. Thereafter plaintiff duly presented a sight draft dated September 12, 1960, for $217,249.50 under said letter of credit drawn on the defendant for the account of Cuban Canadian, together with appropriate invoices, bills of lading and consular documents, said sum representing the purchase price of the sugar so shipped as aforesaid.

9. Thereupon, upon said presentation to the defendant pursuant to the terms of the said letter of credit of the aforesaid sight draft and attached documents, plaintiff demanded payment thereof, which defendant then and there refused and ever since has refused to pay either the whole or any part of said draft.

10. By reason of the aforesaid, there is now due and owing from the defendant to the plaintiff the sum of $217,249.50.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of $217,249.50, together with the costs and disbursements of this action.

RABINOWITZ & BOUDIN

By

Member of the Firm
Attorneys for Plaintiff
Office & P. O. Address
25 Broad Street
New York 4, N. Y.

August 18, 1960

BANCO PARA EL COMERCIO EXTERIOR
DE CUBA,
CALLE 23 NO. 171-173 10 PISO,
VEDADO, HAVANA, CUBA

Dear Sirs,

We hereby authorize you to value on The First National City Bank of New York, N.Y.

For account of B/O Lowry & Co Inc., 99 Wall Street, New York 5, N.Y. Cuban Canadian Sugar Co. Inc., Suite 612, Fifth Ave., New York 17, N.Y., up to the aggregate amount of $650,000.00 (six hundred fifty thousand dollars U.S.CY.)

Available by your draft(s) at Sight

For 100% invoice cost to be accompanied by:

1. Consular form signed by shipper only, in sextuplicate.

2. Full set of on board ocean bills of lading evidencing shipment to United States port drawn to the order of The First National City Bank of New York, N.Y. Notify Lowry & Co. Inc., 99 Wall Street, New York 5, N.Y.

3. Commercial invoice in sextuplicate stating that it covers: up to 200,000 paper bags (100 lbs. net) animal feed sugar at 3.25 cents per lb. F.A.S. vessle Antilla or other Cuban port.

4. Notice of readiness prepared by ship's agent at U.S. port of discharge.

5. Statement by ship's captain that no demurrage is due or statement of demurrage due, which amount payable by seller, to be deducted from invoice amount.

Insurance covered by buyer.
Partial shipments permitted.

Commercial and consular forms showing Cuban Canadian Sugar Co. Inc. as buyer are acceptable.

Bills of lading must be dated during August/September, 1960.

Bills of exchange must be negotiated not later than October 15, 1960.

Except as otherwise expressly stated herein, this credit is subject to the uniform customs and practice for commercial documentary credits fixed by the Thirteenth Congress of the International Chamber of Commerce.

We hereby agree with the drawers, endorsers and bona fide holders of drafts drawn under and in compliance with the terms of this credit that such drafts will be duly honored on due presentation to the drawee.

Yours very truly,

Assistant Cashier

Cuban Law No. 930 of February 23, 1961

EXECUTIVE POWER

COUNCIL OF MINISTERS

I, OSVALDO DORTICUS TORRADO, President of the Republic of Cuba, do hereby make known that the Council of Ministers has enacted and I have approved the following law:

WHEREAS, the measures adopted by the Revolutionary Government in pursuance of the Program of the Revolution have resulted, within a short time, in profound social changes and considerable institutional transformations of the national economy.

WHEREAS, among these institutional transformations there is one which is specially significant due to its transcendence in the economic and financial fields, which is the nationalization of the banks ordered by Law No. 891, of October 13, 1960, by virtue of which the banking functions will hereafter be the exclusive province of the Cuban Government.

WHEREAS, the consolidation and the operation of the economic and social conquests of the Revolution require the restructuration into a sole and centralized banking system, operated by the State, constituted by the National Bank of Cuba, which will foster the development and stimulation of all the productive activities of the Nation through the accumulation of the financial resources thereof, and their most economic and reasonable utilization.

NOW, THEREFORE: In pursuance of the powers vested in it, the Council of Ministers has resolved to enact the following:

LAW NO. 930
THE NATIONAL BANK OF CUBA
CHAPTER I
GENERAL PROVISIONS

Article 1. Hereafter the National Bank of Cuba, acting in the capacity of Bank of the State, with independent juridicial status and patrimony, shall exercise the monetary sovereignty of the Nation and the monopoly of the power to issue of currency; shall centralize the monetary resources temporarily free of the organizations, enterprises and the population; will grant short and long term credit and will take care of the financing of capital investments; will carry out operations and adjustments with foreign entitites; will be the custodian of the monetary and foreign exchange reserves, and will be the only center of adjustments and payments of the Republic.

Article 2. The National Bank of Cuba shall not answer for the obligations of the State or of other public agencies and state enterprises, unless such obligations have been expressly assumed.

Article 3. The National Bank of Cuba, by means of the regulation of the amount and application of the credit, financing and its other functions and operations:

a) Shall favor the consolidation and development of the state and cooperative enterprises.

b) Shall exercise the monetary supervision and control of the realization of the economic and financial plans of the Revolutionary Government by the public agencies, state and cooperative enterprises.

c) Shall demand and verify the most economic utilization of the funds appropriated.

d) Shall promote the intensification of productivity and revenue yielding power of the state enterprises, public utilities and the cooperatives.

e) Shall supervise the realization of the plan of investments of the Revolutionary Government.

f) To verify the necessity and best use of the funds made available for current and capital needs.

g) Shall promote the uninterrupted improvement of the quality standards of the state enterprises public utilities and cooperatives.

h) Shall establish gradually and progressively the principles of credit planning and of monetary circulation.

Article 4. For the purposes set forth in the preceding Article the public agencies, state enterprises and the cooperatives shall be required to submit to the National Bank of Cuba their plans, accounting balances and other reports which they may be asked to furnish, and to exhibit whatever documents may be necessary for the verification and control functions to be attended to by the officials of the Bank.

Article 5. The Bank may adopt measures against the agencies, enterprises, utilities and cooperatives which, after the promulgation of this Law, will not reimburse the loans within the maturity periods agreed in respect thereof. It may charge penalties for morosity on overdue credits; may interrupt or discontinue the granting of additional loans until such time as the matured debt is settled; or may grant loans only on the security or guaranty of the superior agencies, or else may apply other measures.

Article 6. The capital of the National Bank of Cuba shall be ONE HUNDRED MILLION PESOS ($100.000.000.00), which the State contributes out of the capital accounts, contributions, contingency reserves and profits of the institutions and official banking entities and of the banks nationalized by Resolution No. 2, issued by the President of the Republic and the Prime Minister of the Government on September 17, 1960, in pursuance of Law No. 851, of July 6 of the same year, as well as of the capital accounts, contributions, contingency reserves and earnings of the banking institutions which have also passed, for any

reason, to the possession, administration or liquidation by the National Bank of Cuba.

The excess left over and above the capitals assigned, added to the balances of the contingency reserve accounts of the banks nationalized by Law No. 891, of October 13, 1960, excepting those pertaining to the banks referred to in the Second of its Final Provisions shall be used to set up the Contingency Reserve Accounts of the National Bank of Cuba.

Article 7. At the end of each month the National Bank of Cuba shall prepare a balance sheet covering its operations, showing the net earnings for the period. One third of such earnings to be used to feed its Contingency Reserve until it equals its capital, and the "balance of fiscal benefit" (sic) shall be regularly credited to the Treasury Account of the National Bank of Cuba (sic).

Article 8. The National Bank of Cuba shall be exempt from all National, Provincial and Municipal taxes, assessments, and levies of every description; such exemption including its capital, profits, operations, banknotes and currency, and the acquisition or alienation of property of all kinds for the services thereof or as a result of its operations or claims.

Article 9. No official of the National Bank of Cuba may directly or otherwise engage in or practice any sort of profession, business, industrial or agricultural activity having the status of private enterprises. And may not hold any

employment or public or private office or position unless he is first expressly authorized by the President of the Bank.

Article 10. The officials and employees of the Bank shall be required to keep the secret of its operations and affairs, as well of the transactions and accounts of its clientele.

CHAPTER II
MANAGEMENT AND DOMICILE OF THE BANK

Article 11. The National Bank of Cuba shall be ruled and administered with functional autonomy by a President, who shall be freely designated by the President of the Republic.

The President of the National Bank shall be vested with the legal representation of the institution, shall be responsible for its policies, and shall exercise the supreme executive authority and the functions of Chief Executive of the offices and personnel of the Bank with authority to delegate to other officials the duties and powers specified by the Organic Regulations.

The President of the National Bank of Cuba shall have the rank and status of Minister of the Government.

The President of the Republic, on the recommendation of the National Bank of Cuba, shall designate the Vice-Presidents who, in the order of their appointments, shall alternate for the President, attending to his functions. The Organic Regulations shall specify the duties of each of

the Vice Presidents and the number thereof.

Article 12. The National Bank of Cuba shall have its legal domicile and principal place of business in the City of Havana, and such regional offices, branches, agencies and correspondents within and without the national territory as may be provided for by its President.

The local branches and agencies of the National Bank shall be under the direct jurisdiction of the respective regional offices which shall in turn be answerable to the central office. Said offices shall be managed by such administrators or managers as may be designated therefor by the President of the Bank.

CHAPTER III
FUNCTIONS OF THE BANK

A) Currency Issues, Short Term Credits and Other Functions

Article 13. The National Bank of Cuba shall be the only institution authorized:

a) To issue the currency and regulate the monetary circulation in the Country.

b) To coin bullion and print whatever paper currency may be required to maintain the normal supply of means of payment in cash funds.

c) To carry out all kinds of short term credit operations of the national economy, regardless of the activities or segments thereof involved.

d) To receive, hold and custody the deposits of the State and of the official agencies, the State enterprises, and cooperatives, as well as of the private concerns or enterprises, and of the population irrespective of the nature and period or term of such deposits.

e) To organize and effect the adjustments and payments between the agencies and the enterprises.

f) To organize and keep in its custody the savings of the population.

g) To manage the international media of exchange, and to effect and or anise the adjustments with foreign points and the registration of the external loans.

h) To negotiate and execute international payment agreements with foreign banks.

i) To manage and custody the securities of the State and whatever private securities may be entrusted to it.

Article 14. The National Bank of Cuba shall regulate the issues of currency subject to the limitations imposed by the Revolutionary Government on the recommendation of the President of the Bank.

The coined currency and banknotes issued hereunder shall have such distinctive features, designs, denominations, and content and other characteristics as may be determined by the President of the Republic on the recommendation of the President of the National Bank of Cuba.

The coined currency and banknotes issued by the National Bank of Cuba shall be the only coined and printed legal tender currency of the Republic, and must be accepted in payment of all the obligations or liabilities enforceable in the Republic of Cuba.

If any obligation shall have been or shall be assumed in some other currency, it must necesarily be settled and liquidated in legal tender currency. This provision does not apply to the obligations undertaken or covenanted by official agencies in charge of the foreign trade of the Republic, or of other international transactions of the Nation.

The National Bank of Cuba shall exchange its mutilated banknotes and coined currency for others in good condition, subject to whatever regulation the subject it may see fit to adopt.

Article 15. The monetary unit of the Republic of Cuba is the Gold Peso, divided in one hundred Centavos, the weight whereof is 0.987412 grams, with a 0.888671 fine gold content.

Article 16. The short term credit of the National Bank of Cuba may be granted for periods of up to one year. Only in exceptional and qualified cases, expressly approved by the Central Planning Board on the recommendation of the President of the Bank, may credit be extended for a longer period. In any case, it shall be granted in accordance with the credit and monetary circulation plans approved by the Government on the recommendation of the National Bank of Cuba, up to the limits imposed by the resources of the Bank.

For the purposes of its fiduciary policy the National Bank of Cuba shall mobilize all the monetary resources of the economy that are temporarily free, and make them available for carrying out the national economic programs.

The Bank shall accord preferential treatment to the State agencies and enterprises, the People's Farms and the Agricultural Cooperatives.

Article 17. The credits of the National Bank of Cuba shall be secured or backed by raw materials, or processed products, or by crops or future products, shall be granted for specific and concrete purposes provided for in the respective programs, and shall be repayable within the terms or periods fixed by the Bank.

Article 18. Beginning on the effective date of this Law it is strictly prohibited to all other public agencies, states enterprises, and cooperatives, to grant credits to third parties or to one another; which prohibition also applies to credits between private enterprises.

It is likewise prohibited to sell merchandise on credit, with the exception of the sales made for direct consumption by the population.

The President of the National Bank of Cuba, in coordination with the Minister of Domestic Trade, shall adopt the rules and standards that will govern the sales of merchandise on credit for direct consumption by the population.

Article 19. The public and private organizations, the state enterprises, cooperatives and the private enterprises shall deposit in bank accounts in the National Bank of Cuba such of their monetary resources as may exceed their immediate current needs. The balances of these accounts shall be at the free disposal of their owners for adjustments and payments under the direct custody and guaranty of the National Bank of Cuba.

Article 20. The National Bank of Cuba shall be in charge of the reception, maintenance and augmentation of the savings deposits of the population, for which purpose it shall organize the national savings service.

The National Bank of Cuba shall assume the functions heretofore discharged by the Postal Savings Fund, and shall take over the assets and liabilities thereof, in such manner and at such time as may be determined by the President of the Bank.

The President of the National Bank of Cuba may enter into agreements with the Minister of Communications concerning the places where the savings bank service will be rendered through the Post Offices.

Articles 21. The National Bank of Cuba shall fix the interest rates to be paid on the various savings accounts, as well as the interest rates to be charged for its different credit operations.

Article 22. Hereafter the National Bank of Cuba shall attend to all the Treasury functions of the Ministry of Finances.

The Minister of Finances, in agreement with the President of the National Bank of Cuba shall issue instructions "on the registration of the observance or execution of the State Budget" (sic) which shall be compulsory for all the departments of the Public Administration. These instructions shall be made to prescribe the procedure for the classification and registration of the public income and expenses in the accounts of the Bank, shall indicate the authorizations required and signatures of the persons who are competent to draw against Treasury funds, according

to the various purposes thereof; shall establish accounting summary forms which the National Bank of Cuba shall be required to present to the Minister of the Treasury at suitable times, as well as of the other data concerning with the functions of the Treasury.

B) International Operations

Article 23. It is the exclusive privilege of the Cuban State to carry out all operations involving foreign exchange, which shall be transacted only and exclusively through the National Bank of Cuba.

The possession of foreign exchange within the limits of the country, as well as the fixation of exchange rate of the Cuban Peso as against all foreign currencies shall be the exclusive province and competency of the National Bank of Cuba. Such foreign currencies as may for any reason be obtained or acquired by any and all other physical or corporate persons, must be exchanged at the Bank for national currency during the ten days following the acquisition thereof.

The Transfers of foreign currency coming from points abroad to Cuba, to the order of state organizations, state or private enterprises, cooperatives and private parties, shall be cleared through the bank and shall be paid to the respective beneficiaries in Cuban currency at the official exchange rate of the National Bank of Cuba.

Only the Bank may authorize the acquisition or keeping of foreign currencies within or without the national territory by physical and corporate persons domiciled in Cuba.

Article 24. All income and payments in foreign currencies, all adjustments with foreign countries and physical or corporate persons abroad shall be effected only and exclusively under the control of the National Bank of Cuba.

Subject to its other powers the National Bank of Cuba shall be in charge of the following operations concerning the foreign trade and movement of foreign currencies, to wit:

a) To grant short term credits to commercial enterprises depending on the Domestic Trade Ministry in connection with their imports and exports.

b) To effect the adjustments and payments to foreign banks in connection with the import and export operations, and other transactions in foreign currencies.

c) To effect the adjustments and payments derived from exports and imports involving domestic enterprises and organizations.

d) To effect the adjustments of the merchandise export and import operations and other commercial

transactions, according to the appropriations included in the National Budget.

e) To obtain and grant the short term credits in foreign currencies.

Article 25. The National Bank of Cuba shall prepare every year a pro-forma Plan of Income and Disbursements in Foreign Exchange for Non-Commercial or Invisible Reasons, not later than October 31, of each year, and shall submit it to the approval of the Government.

Article 26. The availabilities in currency kept at the credit institutions or other agencies which pertain to physical or corporate persons domiciled abroad may only be used by the same with the express authorization of the President of the National Bank of Cuba or of such officials as he may designate.

C) Long Term Credits and Agricultural Investment Financing

Article 27. The National Bank of Cuba shall take care of the financing of non-reimbursable capital investments of the people's farms and State owned agricultural development undertakings; also of the functions connected with long term credits intended for investments of the farm cooperatives and private agricultural exploitations, in accordance with the agrarian policy of the Revolutionary Government and in pursuance of the plan included in the program of investments of the State.

Likewise, with the resources specifically pledged for that purpose, the Bank may grant long term credits for capital investments of private farming activities, all of which shall be done in accordance with the directions and instructions of the Central Planning Board and coordinatedly with the National Agrarian Reform Institute.

Article 28. All the appropriations included in the Budget of the Republic and pledged for capital investments of the people's farms and the State owned agricultural development enterprises shall be delivered to the National Bank of Cuba.

The Bank shall use these resources to finance, on a non-reimbursable basis, the capital investments of the people's farms and the State owned agricultural development enterprises, and shall exercise full control over the accumulation of those resources, exacting the most economical utilization thereof.

Article 29. The people's farms and the State owned agricultural development enterprises shall obtain resources from the Bank by way of non-reimbursable financing, to defray the expenses incidental to the capital investments provided for in the respective plans, such as constructions, acquisition of machinery and equipment, expansion and improvement of the cattle stocks, incorporation and cultivation of virgin soils, cultivation and development of groves, forests and other investment expenses of the people's farms and State owned agricultural development enterprises.

Article 30. The Bank shall set aside, gradually, the resources appropriated for the financing of the investments referred to in the preceding Article according as the respective construction, development and cultivation work is carried out or as the required machinery and equipment are acquired, within the sums appropriated therefor in the pro-forma development and construction plan approved in each case.

Article 31. The financing of the resources advanced by the Bank on a nonreimbursable basis shall be made out of the amounts and within the limits of the appropriation respectively included in the National Budget for capital investments of the people's farms and State owned agricultural development enterprises.

Article 32. The long term credit granted by the Bank shall be advanced out of the capital and reserves thereof, and of the resources annually appropriated in the National Budgets to take care of those needs.

Article 33. The long term credits for capital investments shall be made available to agricultural cooperatives subject to the limits of the sums approved therefor so as to cover part of the expenses incidental to the construction of buildings and other structures, electrification of agriculture, construction of irrigation and disecation systems, installation of motors and windmills, and acquisition of machinery, increase and improvement

of the cattle stocks, farm implements, incorporation and cultivation of virgin lands, cultivation and development of groves, forestation and other expenses representing investments of the cooperatives.

Article 34. The Bank shall grant the long term credits within the limitation of the annual credit plans approved by the Revolutionary Government.

Article 35. The amounts allowable under the long term credit plan of the Bank shall be distributed among the provinces or regions in agreement with the National Agrarian Reform Institute.

Article 36. The interest rates to be charged by the Bank for the use of long term credits by the agricultural cooperatives and the rural population and the interest rate to be credited or paid by the Bank on the deposit accounts which the cooperatives or their dependencies may keep as resources for investment shall be fixed and changed by its President in agreement with the National Agrarian Reform Institute.

D) Financing Of Non-Agricultural Investments

Article 37. The National Bank of Cuba shall attend to the operations incidental to the financing of the capital investments of the State owned enterprises of industrial, commercial, transporation, public service and other State enterprises other than agricultural undertakings; in accordance with the investment program of the Revolutionary Government.

Article 38. All the appropriations provided for in the national budgets, for capital investments of the enterprises referred to in the proceding Article, shall be delivered to the Bank.

Article 39. The State owned enterprises shall obtain resources from the bank by way of non-reimbursable financings to pay the expenses incidental to capital investments, such as constructions, acquisitions of machinery and equipment, and other industrial investments provided for in the capital investment program of the Revolutionary Government.

Article 40. The Bank shall set aside, gradually, the funds appropriated for the financing of said investments, according as the construction or installation works are carried out, or as the equipment is acquired, and always within the limits of the appropriations therefor included in the duly approved construction or acquisition plan.

Article 41. The Bank shall control and supervise the proper and full accumulation of the funds pertaining to the State owned enterprises to be used for investment purposes, and shall exact the most economic utilization of the resources and investments, in accordance with the respective approved budget.

CHAPTER IV
PROHIBITIONS AND PENALTIES

Article 42. It is strictly prohibited to effect any exportation or transfer to points abroad of any currency,

checks, securities and other documents constituting money or representing means of payment cashable abroad, without the express authorization of the National Bank of Cuba.

The exportation of currency by foreign subjects in transit in Cuba may be effected only to the extent of the amounts imported by such persons and duly registered under certified declarations at any Customs Office of the Republic, after deducting the amounts spent during such person's sojourn or stay in Cuba.

In cases involving foreign technicians or specialists engaged by the Revolutionary Government, official agencies, or State owned enterprises, or by private parties duly authorized therefor by the Government or the Bank, the remittances to points abroad of income earned or received in Cuba shall be limited to the maximum proportions or amounts determined by the National Bank.

Article 43. It is likewise strictly prohibited to export to foreign points any gold, silver, platinum and other precious metals, in ingot, raw, manufactured and other metals, without special authorization of the National Bank of Cuba. The same provision shall apply to all precious stones.

The only exceptions from the foregoing prohibition shall be the personal effects carried with them by nationals or aliens who leave, the country temporarily or permanently, provided the requirements

and regulations established by the National Bank are fully complied with. The Bank shall communicate its provisions in this respect to the Minister of Foreign Trade so that he will enforce them through the competent Customs authorities.

Article 44. It is likewise prohibited to, and import from, foreign points, any legal tender currency of the Republic of Cuba, and any securities and other documents payable in national currency without a special authorization of the National Bank of Cuba.

Cuban natural or residents who have to take temporary trips or voyages to foreign points may be permitted to carry with them small sums in National Currency to finance unavoidable expenses incidental to their return to Cuba.

Article 45. The Customs Offices of the Republic shall attend to the enforcement of the instructions and directives concerning imports and exports of currency, metals, precious stones and national currency or securities. The foreign exchange, metals, precious stones, national currency or securities illegally introduced or carried away into and from the country, and seized from violators hereof shall be impounded in favor of the State.

Article 46. Penalties of imprisonment for three months to three years, and fines of ninety to three hundred quotas shall be applicable to all persons engaging in black market transactions with national

or foreign currency, or precious metals or stones as well as those who treasure up, or speculate with, such assets.

In any case, those responsible for the violations referred to in this Article shall be liable to an accessory penalty consisting of the confiscation of the assets involved in the violation.

SPECIAL PROVISIONS

FIRST. The President of the National Bank of Cuba is hereby authorized to issue whatever resolutions and instructions may be necessary for a strict observance and enforcement of this Law, which shall be binding upon and compulsory for all organizations and agencies; also the internal regulations of the institution and whatever other directives may be deemed appropriate.

SECOND. The President of the National Bank of Cuba shall implant, gradually and progressively, the credit system established by this Law so that it may replace the present system without adversely affecting the national economy.

THIRD. The autonomous State credit agency known as the Foreign Trade Bank of Cuba created by Law No. 793 of April 25, 1960, and the Agricultural and Industrial Credits Department of the National Agrarian Reform Institute, to which Law No. 766 of March 24, 1960 and Law No. 847, of June 30 of the same year, refer, are hereby discontinued.

The assets and liabilities of a banking nature of the institutions dissolved by the preceding paragraph are hereby incorporated in the National Bank of Cuba.

The President of the National Bank of Cuba and the Minister of Foreign Trade shall agree upon the distribution of the capital of the former Foreign Trade Bank of Cuba out of which the shall transfer the sum of Four Million Pesos ($4.000.000) to the capital of the National Bank of Cuba, and Two Million Pesos ($2.000.000) to the capital of the foreign trade enterprises or houses of the Ministry of Foreign Trade (sic).

Likewise the President of the National Bank of Cuba and the Minister of Foreign Trade shall agree upon the distribution of the personnel, offices, equipment and dependencies of the former Foreign Trade Bank of Cuba. Taking into account the trade and banking functions heretofore assigned to said Bank, so that the trade functions will be assumed by the foreign trade enterprises or houses of the Ministry of Foreign Trade, and the banking functions will be taken over by the National Bank of Cuba; and are hereby authorized to redistribute, reorganize and readjust said personnel and offices as they may deem best.

FOURTH. The President of the National Bank of Cuba shall submit to the approval of the Executive Power the proposed organic regulations of the Bank.

FIFTH. The National Bank of Cuba is legal successor to said State Banks and to the Agricultural and Industrial Credits Department of the Agrarian Reform Institute, both of which have been dissolved by this Law, as well as to the private banks nationalized in pursuance of Law No. 851 of July 6, 1960 and Law No. 891 of October 13, 1960, and to the banking institutions which the Government has acquired under contracts shall be deemed to be subrogated to all the property, assets, rights and claims, and to be the successor to, all the obligations peculiar to the banking business, of the institutions incorporated, without requiring any formal records, deeds or endorsements to leave due record of the conveniences of property and securities, credits, and it being unnecessary to enter record of such transfers and conveyance in any register or office of record whatever.

SIXTH. The mortgage credit offices which because of the nationalization of the banking function, or for any other reason, have been incorporated in, or are under the management of, the National Bank of Cuba, shall be deemed to be subject to immediate liquidation in accordance with the rules and provisions adopted by the President of the National Bank of Cuba; it being understood that the fact of the nationalization or Government Administration justifies the inference that the National Bank of Cuba has assumed their liabilities. Once the creditors shall have been paid, and the excess left used to pay the indemnitities payable to the shareholders under Law No. 891, of October 13, 1960,

whatever excess may still be left shall be credited to the Contingency Reserve accounts to the extent that such accounts shall not have reached a total equal to its capital, when such excess shall be credited to the National Treasury Account as an eventual revenue of the State.

SEVENTH. If as a result of the liqudation of mortgage banks or offices, be they State or privately owned, which have been entrusted by law to the National Bank of Cuba, the latter should resolve to advance funds or acquire securities or titles with the object of providing liquid funds that will permit of an orderly and equitable total or partial liquidation to the creditors of said institutions, it shall be understood that such action is being taken for the account of the State, rendering the proper account thereof to the Minister of the Treasury. The Minister of the Treasury is hereby authorized to reimburse to the National Bank the sums advanced for such purpose through the issue of Representative Obligations drawing no interest and without fixed redemption or maturity date, which shall be totally or partially called at such time and to the extent determined by the Government on the recommendation of the National Bank of Cuba either by applying earnings of the Bank itself or unused State Budget appropriations, or by including in the State Budget specific appropriations for such payments.

EIGHTH. The Representation of the Cuban State which Law No. 847, of June 30, 1960 conferred upon the former Agricultural and Industrial Credit Department of the

National Agrarian Reform Institute to manage the property and interests of the former Economic and Social Development Bank (BASNES), which were transferred to the State, are hereby transferred and conveyed to the National Bank of Cuba in the same measure and to the same extent provided for in said Law.

TRANSITORY PROVISIONS

FIRST. It shall note be understood that the nationalization of banks ordered by Law No. 891, of October 13, 1960 has been applied to the private banks of any kind which, because they are technically bankrupt or insolvent were on that date under intervention or subject to other safety measures adopted by the National Bank of Cuba or by the Deposits Insurance Fund. These banks shall be carried to final liquidation by the National Bank of Cuba, which shall assume responsibility for only the deposits and, in compensation, shall adjudicate to itself their respective assets. The creditors who do not have such status as depositors shall be paid, with preference over the stockholders, to the extent that the realization of the assets may exceed the liabilities for deposits. The right of the stockholders shall be reducted to a pro-rata portion of the excess left as a result of the realization of the assets after all creditors shall have been paid, without any right to any other reimbursement and much less as indemnity for expropriation, which shall not be applicable or payable in such cases.

SECOND. The action taken by the Commission in charge of the management of the Deposits Insurance Fund by reason of the provisions of Law No. 891, of October 13, 1960, after that date, is hereby terminated; the National Bank of Cuba being hereby charged with the liquidation of that Fund. The assets and liabilities, property, rights and obligations of said Fund are hereby transferred to the National Bank of Cuba, which shall hereafter, vested with full powers, carry out the liquidations pending consummation by the Bank, or by the Deposits Insurance Fund, and any other administrative or judicial jurisdiction that may then be handling or which may be competent to handle, such liquidations, shall cease as of then.

The resolutions of the President of the National Bank of Cuba concerning bank liquidations may be contested only through contentious administrative appeals lodged in the form and at the time prescribed by the current legislation on the subject.

THIRD. Pending the promulgation of the Organic Regulations for Banks to which this Law refers, the President of the National Bank of Cuba shall be vested with full powers of administration and control of and over all the property, securities and other assets of the Bank, regardless of whether or not they are in Cuba or elsewhere, and is hereby authorized to delegate to other officials or special representative whatever specific or general functions, including the Bank's representation in Court, through resolutions, powers of

attorney, authorizations or ratifications of prior authorizations to sign in behalf of the Bank, subject to such additions and limitations as he may deem advisable; also to revoke the powers of attorney or other authorizations presently standing or which he may hereafter confer hereunder.

FOURTH. Pending the promulgation of the Organic Regulations for Banks referred to in this law, the President of the National Bank of Cuba may open, close, or redistribute bank branches, agencies and offices as may best serve the purposes and proper application of this law. Likewise, during that period the President of the National Bank of Cuba shall be empowered to designate and appoint officials and deputies, entrust and suspend functions and missions, decree transfers, removals or discharges, and adopt any other resources which he may deem necessary with a view to the proper administration of the Bank.

FINAL PROVISION

Law No. 13 of December 23, 1948 is hereby repealed except insofar as it served to create the National Bank of Cuba; also Law No. 790, of April 23, 1960, and whatever other legal provisions and regulations may be at variance with the provisions of this Law, which become operative from the date of its publication in the Official Gazette of the Republic.

NOW, THEREFORE: I hereby direct that this Law be fully observed and enforced by all concerned.

DONE at the Presidential Palace, in Havana, this 23rd day of February, 1961.

OSVALDO DORTICOS TORRADO

Fidel Castro Ruz, Prime Minister

Rolando Diaz Aztarain, Minister of the Treasury

(Official Gazette No. 6 - Special Issue - of February 23, 1961).

Answer

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BANCO PARA EL COMERCIO EXTERIOR DE CUBA, Plaintiff,	61 CIV 410
- against -	ANSWER
THE FIRST NATIONAL CITY BANK OF NEW YORK, Defendant.	

Defendant The First National City Bank of New York answers the complaint herein as follows:

1. Defendant has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 1 thereof except that since prior to the commencement of this action plaintiff was and all times since then has been and now is an agent and instrumentality of the Republic of Cuba wholly owned by said Republic.

2. Admitted.

3. Defendant admits that plaintiff purports to invoke the jurisdiction of this Court under Title 28 U.S.C. 1332 but denies knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 3 thereof that plaintiff is a foreign corporate body.

4. Defendant has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 4 thereof.

5. Defendant denies each and every allegation contained in paragraph 5 thereof except that on or about August 17, 1960 Lowry & Company, Inc. requested defendant to open a letter of credit in favor of plaintiff and that on or about August 18, 1960 defendant opened its commercial Letter of Credit No. 964209 and sent to plaintiff its advice thereof in the form annexed to the complaint herein as Exhibit A.

6. Defendant has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 6 thereof.

7. Defendant has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 7 thereof.

8. Defendant has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 8 thereof except that on or about September 15, 1960 it received from Banco Nacional de Cuba which is like plaintiff an agent and instrumentality of the Republic of Cuba wholly-owned by said Republic, documents tendered in purported compliance with said Letter of Credit No. 964209 including a sight draft dated September 12, 1960 drawn by plaintiff upon

defendant to the order of plaintiff in the amount of $217,249.50.

9. Defendant denies each and every allegation contained in paragraph 9 thereof.

10. Defendant denies each and every allegation contained in paragraph 10 thereof.

FOR A FIRST COMPLETE DEFENSE AND AS A SET OFF AND COUNTERCLAIM THE DEFENDANT ALLEGES:

11. This action is brought by and for the benefit of the Republic of Cuba by and through its agent and wholly-owned instrumentality, the plaintiff herein, which is in fact and law and in form and function an integral part of and indistiguishable from the Republic of Cuba.

12. In and before the year 1898 the territory of the Republic of Cuba was a colony of the Kingdom of Spain. In or about April 1898 the peoples of the territory of Cuba asserted their right to independence. On or about April 20, 1898 the United States of America recognized the independence of the peoples of Cuba.

13. In consequence of such recognition the United States of America engaged in war with the Kingdom of Spain and carried on such war for and on behalf of the peoples of Cuba until the peoples of Cuba had been liberated. On December 10, 1898, the Treaty of Paris was duly executed by

the United States of America and the Kingdom of Spain, and pursuant to such Treaty the Kingdom of Spain withdrew all of its forces, both military and civil, from Cuba.

14. By reason of the action of the United States of America, the peoples of Cuba were emancipated and were enabled to and did establish an autonomous government for themselves and for the area of Cuba. The United States of America recognized the autonomous government of the Republic of Cuba upon its creation and has continued to extend recognition to the successor lawful governments of the Republic of Cuba.

15. From the inception of the said independent Republic of Cuba, the laws of Cuba have provided for the private ownership of property and for the protection of rights concerning such private property; and by its establishment and administration and enforcement of such laws and otherwise, the Republic of Cuba initially and until the latter part of the year 1960 represented that it would protect and preserve all businesses legally established within the Republic of Cuba and all private rights acquired therein and would protect and defend all such businesses lawfully carrying out the legitimate objects thereof, and that it was and at all times would be ready, willing and able to meet all of its international commitments and otherwise conform to the Law of Nations.

16. In reliance upon the representations made by the Republic of Cuba for the protection of property and property

rights and upon its integrity, good faith and dedication to the principles of freedom, all as hereinabove set forth in paragraph 15 hereof, and pursuant to the laws of Cuba and to Section 25 of the Federal Reserve Act, the defendant, in or about August, 1915, opened a branch of its banking business in the City of Havana, Cuba, for the purposes of carrying on the business of banking in furtherance of the foreign commerce of the United States, and for the provision of banking services and facilities for the business activities of Cuba and its inhabitants and the development of its natural resources and trade, all of which comprise the economy of the Republic of Cuba; and in further reliance on said representations, defendant continued to invest in the Republic of Cuba additional funds and to open and operate additional branches, and on September 16, 1960 defendant maintained and operated eleven distinct and separate branches within the Republic of Cuba.

17. On or about December 31, 1958 a new government calling itself the Revolutionary Government of Cuba and being under the leadership of one Fidel Castro assumed de facto control of the Republic of Cuba and on or about January 7, 1959 the United States of America formally extended recognition to Castro's Revolutionary Government.

18. Subsequent to January 7, 1959, the Republic of Cuba formally and expressly reaffirmed its representations, assurances and guaranties with respect to the preservation of private property and with respect to the other matters set forth

in paragraph 15 hereof, and to this end on or about February 17, 1959 the Republic of Cuba by the said Revolutionary Government promulgated the Fundamental Law of Cuba, Articles 24 and 87 of which provided and still provide, in English translation, as follows:

"Article 24. Confiscation of property is prohibited, but it is authorized for the property of the Tyrant deposed on December 31, 1958 and of his collaborators, of natural or juridical persons responsible for crimes committed against the national economy or the public treasury, and those who are enriched or have been enriched unlawfully under the protection of the public power. No other natural or juridical person can be deprived of his property except by competent judicial authority and for a justifiable reason of public benefit or social interest and always after payment of appropriate compensation in cash, fixed by court action. Non-compliance with these requirements shall give the person whose property has been expropriated the right to protection by the courts and, if the case warrants, to restitution of his property."

"The reality of the grounds for public benefit or social interest and the need for expropriation shall be decided by the courts in the event of challenge."

"Article 87. The Cuban State recognizes the existence and legitimacy

of private property in its broadest concept as a social function and without other limitations than those which, for reasons of public necessity or social interest, are imposed by law."

19. On or about August 17, 1960 Lowry & Company, Inc. requested defendant to open a letter of credit in favor of plaintiff in the amount of $650,000. Defendant complied with such request and on or about August 18, 1960 established its commercial Letter of Credit No. 964209.

20. On or about September 15, 1960 defendant received from Banco Nacional de Cuba documents tendered in purported compliance with the requirements of defendant's said Letter of Credit No. 964209.

21. Upon examination of said documents defendant determined that they were not in compliance with Letter of Credit No. 964209 and on or about September 16, 1960 defendant so advised Banco Nacional de Cuba.

22. On September 16, and 17, 1960 the Republic of Cuba forceably seized and took from the defendant all of the branch offices and the business and property of defendant in the Republic of Cuba, and declared itself substituted for and subrogated in place and stead of the defendant with respect to such property and rights as well as the entire assets and liabilities of defendant within the Republic of Cuba, without the consent of the defendant but against its will, and without compensation of any sort whatsoever.

23. The seizure by the Republic of Cuba of the defendant's property within the territory of the Republic of Cuba as alleged in paragraph 22 hereof was discriminatory, confiscatory and in violation of international law, and the laws of the United States, and the laws of the Republic of Cuba itself.

24. Thereafter the Government of the United States of America protested against the action alleged in paragraph 22 hereof and declared such action to have been forced expropriation taken under color of a discriminatory, confiscatory and arbitrary law.

25. On or about September 22, 1960 defendant received from Banco Nacional de Cuba a cable reading in part as follows:

> "13002 REFERRING YOUR CABLE OF 9/16 OUR COLLECTION FOR US DOLLARS 217,249.50 UNDER YOUR IRREVOCABLE CREDIT 964209 WE AUTHORIZE DEDUCTION FOR DEMURRAGE AND DIFFERENCE IN WEIGHT UP TO US DOLLARS 23,969.20"

26. On or about September 22, 1960 defendant, with the express consent of Lowry & Company, Inc. and in reliance upon the authorization of Banco Nacional de Cuba set forth in the preceding paragraph hereof waived the non-compliance of the documents presented under Letter of Credit No. 964209; made payment under said Letter of Credit in the agreed amount of $193,280.30 (which sum represented the amount of the

draft presented less the authorized deduction of $23,969.20 as alleged in the preceding paragraph hereof); and thereby performed all of its obligations and discharged all of its liabilities with respect to said Letter of Credit No. 964209.

27. Thereupon defendant became indebted to the Republic of Cuba in the amount of the proceeds of said Letter of Credit No. 964209, namely, $193,280.30.

28. On or about September 22, 1960 defendant applied the amount owing by it to the Republic of Cuba as aforesaid as an offset to its claim against the Republic of Cuba for the value of its property seized by the Republic of Cuba.

29. On or about September 23, 1960 defendant sent a cable to Banco Nacional de Cuba which read as follows:

> "YOUR COLLECTION UNDER OUR COMMERCIAL CREDIT 964209 PAID AND PROCEEDS APPLIED AS PER OUR CABLE SEPTEMBER 20"

"OUR CABLE SEPTEMBER 20" referred to in said cable of September 23, 1960 was a cable which defendant had sent to Banco Nacional de Cuba on September 20, 1960 reading as follows:

> "THIS IS TO NOTIFY YOU THAT IN VIEW OF ACTION TAKEN RESPECTING OUR BRANCHES IN CUBA WE HAVE EXERCISED OUR RIGHTS OF LIEN AND OFFSET AND CLOSED YOUR ACCOUNTS AS OF SEPTEMBER 17"

30. At all times mentioned herein Banco Nacional de Cuba was and it now is an agent and instrumentality of the Republic of Cuba wholly-owned by said Republic, and all acts herein alleged to have been done either by plaintiff or by said Banco Nacional de Cuba were in law and in fact done by and for the benefit of the Republic of Cuba.

31. On January 3, 1961 the Government of the United States severed diplomatic relations with the Government of the Republic of Cuba on the ground that the harassment and vilification by the said Government of the Republic of Cuba had passed endurance and thus indicated that the normal courtesies extended between friendly nations would not be continued as to the Republic of Cuba.

32. By reason of the matters hereinbefore set forth, the defendant has been damaged by the wrongful and tortious acts of the Republic of Cuba in an amount substantially in excess of the amount claimed in the complaint herein but at present indeterminable, and the defendant is entitled to setoff against such damages the amount claimed in the complaint herein, leaving a balance due and owing from the Republic of Cuba to the defendant.

FOR A SECOND COMPLETE DEFENSE AND AS A SETOFF AND COUNTERCLAIM THE DEFENDANT ALLEGES:

33. It repeats and realleges each and every allegation contained in paragraphs 11 through 31 hereof.

34. The reasonable value of the business and property of defendant in the Republic of Cuba, at the time of the seizure thereof by the Republic of Cuba, was substantially in excess of the amount claimed in the complaint herein. The Republic of Cuba promised to and was obligated by international law to pay prompt, adequate and effective compensation to defendant and others whose property it seized.

35. No part of such compensation has been paid to defendant but, on the contrary, the Republic of Cuba has repudiated its obligation to make such payment and has waived the necessity of any demand therefor.

36. By reason of the matters hereinbefore alleged, the Republic of Cuba is indebted to the defendant in an amount substantially in excess of the amount claimed in the complaint herein but at present indeterminable, and the defendant is entitled to setoff against such indebtedness the amount claimed in the complaint herein, leaving a balance due and owing from the Republic of Cuba to the defendant.

FOR A THIRD COMPLETE DEFENSE THE DEFENDANT ALLEGES:

37. The real party in interest is not Banco Para El Comercio Exterior de Cuba, the plaintiff herein, but the Republic of Cuba. The action must be dismissed because it is not being prosecuted

in the name of the real party in interest.

WHEREFORE, the defendant demands judgment herein:

1. Dismissing this action with prejudice;

2. Adjudicating that the Republic of Cuba is liable to the defendant in an amount in excess of the amount specified in the complaint herein, without prejudice to the defendant's rights at any subsequent time, through diplomatic channels or in an international forum, in any forum in any foreign nation, or in any court in the United States, to assert such liability of the Republic of Cuba either through affirmative relief or as a matter of defense, offset, counterclaim, or by such other means as may from time to time be available to it;

3. For such other, further and different relief as to the Court may seem just.

Dated: New York, New York
March 6, 1961

SHEARMAN & STERLING & WRIGHT

By _____
Member of the firm
Attorneys for defendant
20 Exchange Place
New York, N.Y.

Stipulation and Order of July 7, 1961 Substituting Republic of Cuba in Place of Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BANCO PARA EL COMERCIO EXTERIOR DE CUBA,

Plaintiff,

- against -

61 Civ. 410

THE FIRST NATIONAL CITY BANK OF NEW YORK,

STIPULATION

Defendants.

Plaintiff having represented that by virtue of Laws No. 930 and 934, both of February 23, 1961, plaintiff herein has been dissolved, and that the claim of the plaintiff involved in this proceeding has been transferred to a newly created Ministry of Foreign Trade of the Republic of Cuba,

IT IS HEREBY STIPULATED, that pursuant to Rule 25-c of the Federal Rules of Procedure, the Republic of Cuba may be substituted in the place and stead of plaintiff in the above action; and it is

HEREBY FURTHER STIPULATED, that plaintiff may serve and file a supplemental complaint in the form annexed hereto.

/S/
Attorneys for Plaintiff

/S/
Attorneys for Defendant

SO ORDERED:

/S/
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REPUBLIC OF CUBA	:	
Plaintiff,	:	
- against -	:	SUPPLEMENTAL
	:	COMPLAINT
THE FIRST NATIONAL CITY BANK OF NEW YORK,	:	
Defendant.	:	

Plaintiff, complaining of the defendant, by its attorneys, Rabinowitz & Boudin, alleges:

1. Banco Para el Comercio Exterior de Cuba (hereinafter referred to as "Banco") was, prior to February 23, 1961 a corporate body organized and existing under the laws of the Republic of Cuba and having its domicile in the City of Havana, Cuba. On February 23, 1961, by virtue of Laws No. 930 and 934, both of February 23, 1961, Banco was dissolved and certain of its assets and liabilities, including the claim which is the subject of this action, were assumed by plaintiff.

2. Defendant The First National City Bank of New York is a national banking association duly organized under the laws of the United States of America, having its domicile in the City and State of New York and being a citizen of said State.

3. The jurisdiction of this Court is invoked under Title 28, U.S.C. 1332, in that plaintiff is a foreign government and the defendant is a citizen of the State of New York. The amount in controversy exceeds the sum of $10,000.00, exclusive of interest and costs.

4. Heretofore and on or about August 12, 1960, Banco entered into a contract in writing with Cuban Canadian Sugar Company, Inc. (hereinafter referred to as Cuban Canadian), whereby Banco sold and Cuban Canadian purchased 200,000 bags of sugar of about 100 lbs. each at the price of $3.25 per bag, free alongside ship at a port in Cuba, for which Cuban Canadian agreed to pay by the establishment, no later than August 19, 1960, of an irrevocable letter of credit in favor of Banco through a New York bank, covering the full value of the sugar so sold.

5. Thereafter, and on or about the 18th day of August, 1960, Cuban Canadian procured from and caused to be delivered to Banco a letter of credit of the defendant in the sum of $650,000.00 in favor of Banco, payable against delivery of sight drafts and invoices with bills of lading attached, covering up to 200,000 paper bags of sugar at $3.25 per bag, whereby the defendant promised to and agreed with Banco that the defendant would pay to Banco, upon presentation, Banco's draft or drafts drawn on the defendant for a sum not

exceeding $650,000.00, accompanied by appropriate invoices and bills of lading. A copy of said letter of credit is annexed hereto as Exhibit A.

6. Thereafter, after receipt by Banco of said letter of credit, Banco, in reliance on the terms thereof, proceeded to perform its said contract with Cuban Canadian and to ship 66,846 bags of sugar from Cuba to Pascagoula, Mississippi, on board the S.S. Asenos.

7. Banco duly performed all the conditions of its contract with Cuban Canadian on its part to be performed.

8. Thereafter, Banco duly presented a sight draft dated September 12, 1960, for $217,249.50 under said letter of credit drawn on the defendant for the account of Cuban Canadian, together with appropriate invoices, bills of lading and consular documents, said sum representing the purchase price of the sugar so shipped as aforesaid.

9. Thereupon, upon said presentation to the defendant pursuant to the terms of the said letter of credit of the aforesaid sight draft and attached documents, Banco demanded payment thereof, which defendant then and there refused and ever since has refused to pay either the whole or any part of said draft.

10. By reason of the aforesaid, there is now due and owing from the defendant to the plaintiff the sum of $217,249.50.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of $217,249.50, together with the costs and disbursements of this action.

RABINOWITZ & BOUDIN

By _____
Member of the Firm
Attorneys for Plaintiff
25 Broad Street
New York 4, N.Y.

EXHIBIT A

[This document appears at pp. 80-81]

Plaintiff's Notice of Motion to Substitute Cubazucar as Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

BANCO PARA EL COMERCIO EXTERIOR DE CUBA,

Plaintiff

v.

THE FIRST NATIONAL CITY BANK

Defendant.

61 Civ. 410 (FvPB)

NOTICE OF MOTION

- - - - - - - - - - - - - - - - - - - x

TO:
Shearman and Sterling
53 Wall Street
New York, New York 10005
Attention: Henry Harfield, Esq.

SIRS:

PLEASE TAKE NOTICE that plaintiff, through its undersigned counsel, will move the United States District Court for the Southern District of New York, the Honorable Fredrick vanPelt Bryan, Presiding, at the United States Courthouse, Foley Square, New York, New York at a time to be fixed by the court for an order pursuant to Rule 25 of the Federal Rules of Civil Procedure substituting Empresa Cubana Exportador de Azucar y sus Derivados ("Cubazucar") as the

plaintiff herein. In support of said motion plaintiff will rely upon the attached affidavit of Michael Krinsky, Esq., and the exhibits thereto.

RABINOWITZ, BOUDIN & STANDARD

By:_____
30 East 42nd Street
New York, New York 10017
Attorneys for Plaintiff

Dated: New York, New York
May 2, 1975

Plaintiff's Affidavit in Support of Motion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

BANCO PARA EL COMERCIO EXTERIOR DE CUBA,

Plaintiff

v.

THE FIRST NATIONAL CITY BANK

Defendant.

61 Civ. 410 (FvPB)

AFFIDAVIT

- - - - - - - - - - - - - - - - - - - x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MICHAEL KRINSKY, being duly sworn, deposes and says:

1. I am an attorney associated with the firm of Rabinowitz, Boudin & Standard, attorneys for plaintiff herein. I make this affidavit in support of the instant motion to substitute Empresa Cubana Exportadora de Azucar y Sus Derivados ("Cubazucar") as plaintiff herein. The motion is made pursuant to Rule 25 of the Federal Rules of Civil Procedure.

2. This is an action for the proceeds from the sale of sugar sold under contract by Banco para el Comercio Exterior

de Cuba ("Bancec") in 1960. By a series of Cuban decrees and resolutions, Cubazucar has succeeded to the claims sued upon herein.

3. At the time of the sale of the sugar Bancec was a Cuban entity established by Law No. 793 of May 4, 1960 of the Republic of Cuba.

4. By Law No. 930, dated February 23, 1961, Bancec was dissolved. By the "Fifth" paragraph of the "Special Provisions" of Law No. 930, Banco Nacional de Cuba succeeded to all the assets, rights and claims of Bancec "peculiar to the banking business." No disposition of the other assets, rights and claims of Bancec was made in Law No. 930, a copy of which with English translation is attached hereto as Exhibit A.

5. The assets, rights and claims of Bancec not "peculiar to the banking business" were disposed of by Law No. 934, also promulgated on February 23, 1961.

Law No. 934 established a "ministry of Foreign Trade" with responsibility for the over-all planning and direction of Cuba's foreign trade policies and activities (Articles 1 through 5). Actual commercial operations were to be carried on by independent enterprises established by the Ministry. Article 6 provides:

> "The direct and concrete transaction of trade operations involving imports and

> exports in accordance with he policy designed or adopted by the Ministry shall be handled by 'special foreign trade enterprises or houses' with independent legal personality and with their own capital and administration, which shall be set up and operated under the supervision of the Ministry.
>
> The enterprises to which this article refers shall act independently from the Ministry which, therefore, shall not be liable for the obligations undertaken by them."

A copy of Law No. 934 with English translation is attached hereto as Exhibit B.

It is these "special foreign trade enterprises or houses" which were made the successors to the rights and obligations of Bancec not disposed of by Law 930. The "Fourth" paragraph of the "Transitory Provisions" of Law No. 934 provides:

> "All the functions of a mercantile character heretofore assigned to said Foreign Trade Bank of Cuba are hereby transferred and vested in the foreign trade enterprises or houses set up hereunder, which are subrogated to the rights and obligations of said former Bank in pursuance of the assignment of those functions ordered by the Minister."

6. Pursuant to the powers vested in it by Article 6 of Law 934, the Ministry of Foreign Trade issued Resolution No. 1, dated March 1, 1961, creating the "special enterprise" of "foreign trading house" known as "Empresa Cubana de Exportaciones." Consistent with the "Fourth" paragraph of the "Transitory Provisions" of Law No. 934 set our above, the "Second" paragraph of Resolution No. 1 provided:

> "The firm 'Cuban Enterprise for Exports' which is created by this Resolution shall assume the direct and concrete execution of all the commercial export operations of the Nation, as well as the export operations of a commercial nature which were assigned to the former Cuban Bank for Foreign Trade, remaining subrogated in the rights and obligations of said Bank as regards the commercial export activities."

A copy of Resolution No. 1 with English translation is attached hereto as Exhibit C.

As "Empresa Cubana de Exportaciones" was assigned the functions of exporting Cuban goods, the rights under the contract at issue here passed to it.

7. By Resolution No. 102, issued by the Ministry of Foreign Trade on Decem-

ber 29, 1961, the "Empresa Cubana de Exportaciones" was dissolved as of December 31, 1961. A copy of Resolution No. 102 with English translation is attached hereto as Exhibit D.

On January 1, 1962, the Ministry issued Resolution No. 1, creating the "Empresa Cubana Exportadora de Azucar y sus Derivados."

In conformity with Law No. 934, Resolution No. 1 provides that Cubazucar succeed to the rights and obligations of Bancec relating to Cubazucar's functions, that is, foreign commerce relating to sugar and its derivatives. The "Second" paragraph of Resolution No. 1 reads:

> "SECOND: The CUBAZUCAR Enterprise that is created by this Resolution will take over the direct and concrete conduct of all foreign commerce operations relating to sugar and its derivatives, and is subrogated in shared and rights, and substituted in contractual or extracontractual obligations, appertaining to the 'Empresa Cubana de Exportaciones' and to the 'Banco Para el Comercio Exterior de Cuba' as the result of said operations."

A copy of Resolution No. 1 with English translation is attached hereto as Exhibit E.

Subsequent to Resolution No. 1 of 1962, there has been no legislation affecting the juridical nature of Cubazucar or its possession of the claims sued upon herein.

As the claims sued upon here arose from the exportation of sugar, Cubazucar is the successor thereto and is the proper plaintiff herein.

WHEREFORE, your affiant prays that the motion to substitute Cubazucar as the plaintiff herein be granted.

MICHAEL KRINSKY

Sworn to before me, this
1st day of May, 1975.

Notary Public

[Exhibit A appears at pp. _____, Exhibit B appears at Pet. 17d, and Exhibit C appears at Pet. 25d]

RESOLUTION No. 102

WHEREAS: Article 7 of Law 934 dated February 23, 1961, empowers the undersigned not only to set up firms or establishments for foreign trade but also to organize them, recast them, put an end to them and liquidate them, or incorporate their assets and liabilities into any other agency that the Government may designate.

WHEREAS: By Resolution 1, issued by the undersigned on March first, 1961, there was created the firm or establishment for foreign trade known as "Empresa Cubana de Exportaciones," which is entrusted with the direct and concrete execution of all commercial exportation operations of the nation, as well as the exportation functions of a commercial nature that the Banco para el Comercio Exterior de Cuba had had assigned to it, subrogating for it in the rights and duties of the said Bank in respect of commercial exportation activities.

WHEREAS: In virtue of the diverse nature of the activities to be carried on in the field of foreign trade, it has become necessary to restructure the "Empresa Cubana de Exportaciones," and consequently to order its extinction and subsequent liquidation, while its functions would be assumed by new firms or establishments for foreign trade that will be created for the purpose.

WHEREAS: It is likewise necessary to order the transitional steps leading to the creation of the new firms, expecially those relating to the transfer of assets and

liabilities, property, rights and securities of all kinds; as well as steps concerning subrogation in rights and substitution in duties of the "Empresa Cubana de Exportaciones."

THEREFORE: In virtue of the powers vested in me,

I R E S O L V E :

FIRST: Extinction is ordered, as of December 31, 1961, of the entity known as "Empresa Cubana de Exportaciones," created by Resolution 1, issued by the undersigned on March first, 1961, and its functions shall be taken over by new firms or establishments for foreign trade that will be created for the purpose.

SECOND: The capital of THREE HUNDRED THOUSAND PESOS ($300,000.00) assigned to the "Empresa Cubana de Exportaciones" shall be distributed among the new firms or establishments for the foreign trade that are created, in the proportion, form and amount provided in the resolutions creating the same.

THIRD: All the assets and liabilities of the "Empresa Cubana de Exportaciones" are transferred as is fitting to the new firms or establishments for foreign trade, which are subrogated for it in all securities and rights, and substituted for it in all the contractual or extracontractual obligations of the "Empresa Cubana de Exportaciones" and the extinguished "Banco para el Comercio Exterior de Cuba," strictly respecting the legitimate rights of third

parties, whether Cuban or foreign, or whether within or outside of Cuban territory.

FOURTH: Likewise, there are transferred to the new firms or establishments for foreign trade all the property, equipment, furniture, stock, files, books, documents and so forth belonging to the "Empresa Cubana de Exportaciones."

FIFTH: The personnel serving in the "Empresa Cubana de Exportaciones" shall be incorporated into the firms that are created, in the most suitable manner.

SIXTH: All questions of a legal, banking, commercial or any other nature that may arise during the process of liquidating the "Empresa Cubana de Exportaciones" shall be decided by a Liquidating Commission, which will be appointed for the purpose.

SEVENTH: The present Resolution shall be published in the Official Gazette of the Republic, for the information of the public.

GIVEN in Havana, Ministry of Foreign Trade, on the twentyninth day of December, nineteen hundred sixty-one. "YEAR OF EDUCATION."

Commandant Alberto Mora Becerra
Minister of Foreign Trade

EH:ems

(Translation from Spanish)

RESOLUTION No. 1

WHEREAS: Article 6 of Law No. 934 of February 23, 1961 grants express powers to the undersigned to create special enterprises or firms for foreign commerce, with independent juridical personality and with their own property and administration, which enterprises and firms shall take care of the direct and concrete conduct of the Nation's export and import commercial operations.

WHEREAS: Resolutions No. 102 and No. 103, issued by the undersigned on December 29, 1961, ordered the liquidation of the EXPRESA CUBANA DE EXPORTACIONES and the EMPRESA CUBANA DE IMPORTACIONES, respectively, whose functions will be taken over by new enterprises or firms for foreign commerce, which will be set up for the purpose.

WHEREAS: To attain the ends assigned this Ministry, it is necessary to create an enterprise or firm for foreign commerce for the direct and concrete conduct of the operations of foreign commerce relating to sugar and its derivatives.

THEREFORE: In virtue of the powers vested in me.

I O R D E R:

FIRST: To create an enterprise of firm foreign commerce, with independent juridical personality and with its own property

and administration, which shall be called "EXPRESA CUBANA EXPORTADORA DE AZUCAR Y SUS DERIVADOS," but which may be idenfitied for all legal purposes by the signs CUBAZUCAR, which shall have its domicile in the City of Havana, Cuba.

SECOND: The CUBAZUCAR Enterprise that is created by this Resolution will take over the direct and concrete conduct of all foreign commerce operations relating to sugar and its derivatives, and is surrogated in shares and rights, and substituted in contractual or extra-contractual obligations, appertaining to the "Empresa Cubana de Exportaciones" and to the "Banco para el Comercio Exterior de Cuba" as the result of the said operations.

THIRD: With respect to the activity, functioning and organization of the CUBAZUCAR Enterprise, it shall be governed by the Statutory Rules to be issued in due course, for the purpose of best carrying on and developing the activities and tasks that may be entrusted to it by the Law and by this Resolution under the guidance of this Ministry, in conformity with the government plans for foreign commerce.

FOURTH: The management, administration and legal representation of the CUBAZUCAR Enterprise shall be entrusted to a General Manager who, until issuance of the Statutory Rules referred to in the preceding paragraph, shall assume whatever functions, powers and attributions shall be necessary for attaining the ends for which the firm has been created.

The General Manager shall be assisted in the functions of managing and administering the Enterprise by two or more Assistant Managers.

FIFTH: The initial capital of the Enterprise created by this Resolution shall consist of the sum of ONE HUNDRED THOUSAND PESOS ($100,000.00), which shall be taken from the total of ONE MILLION PESOS ($1,000,000.00), which the liquidated "Empresa Cubana de Importaciones" had assigned as its capital.

SIXTH: The CUBAZUCAR Enterprise shall act independently of this Ministry, in virtue of the juridical personality and property of its own that it has, so that the Cuban State shall not be responsible for obligations entered into by the said Enterprise, and the latter shall not be responsible for obligations entered into by the Cuban State.

SEVENTH: Within a period of thirty days from the date of the constitution of the CUBAZUCAR Enterprise, the General Manager thereof shall publish a complete list of the products in which it will deal.

EIGHTH: The present Resolution shall be published in the Official Gazette of the Republic, for public knowledge.

GIVEN in Havana, at the Ministry of Foreign Commerce, on the first day of January, nineteen hundred sixty-two. "YEAR OF PLANNING."

Maj. Alberto Mora Becerra
Minister of Foreign Commerce

EH:ems

[The English translations only have been reproduced.]

Defendant's Memorandum in Opposition to Plaintiff's Motion for Substitution

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BANCO PARA EL COMERCIO EXTERIOR DE CUBA,	Index No. 61 Civ. 410 (FvPB)
Plaintiff	DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUBSTITUTION
v.	
THE FIRST NATIONAL CITY BANK	
Defendant.	

STATEMENT*

By means of the instant motion, attorneys for plaintiff are attempting to substitute Empresa Cubana Exportadora de Azucar y sus Derivados ("Cubazucar") for the present plaintiff pursuant to Rule 25 of the Federal Rules of Civil Procedure.

This is not a novel development with regard to this action. Following service of the answer, defendant was advised that the plaintiff had been dissolved by virtue of Law Nos. 930 and 934 both of February 23, 1961, and that the interest of the plaintiff had been transferred to a newly created Ministry of Foreign Trade of the Republic of Cuba.

*No affidavit is submitted with this memorandum as the facts are essentially of record.

On or about July 12, 1961, an order was entered upon stipulation permitting plaintiff's attorney to substitute the Republic of Cuba as the plaintiff in this action. This change was never made, however. Mr. Rabinowitz stated that under a resolution (No. 2 of Friday, March 3, 1961) Empresa de Exportaciones ("Empresa") succeeded to the claim involved in this action. (Cubazucar, which has been in existence since January 1, 1962, is the alleged successor to Empresa.) Mr. Rabinowitz then stated that perhaps he owed a duty to his clients to have this other plaintiff substituted rather than the Republic of Cuba.

In August of 1961, plaintiff's attorneys were informed by defendant's counsel that this shuffling around of plaintiff entities essentially created more heat than light in the action. At that time, Mr. Rabinowitz replied that he had no desire to complicate matters and that there would be some way of working out this problem. However, from the Summer of 1961 until now, plaintiff has been silent on the issue on substitution of plaintiffs.

Also, on September 28, 1973, at a pretrial conference in this matter, Mr. Rabinowitz stated that he would not question the validity against plaintiff of counterclaims based on the acts of the Cuban government. Now 14 years later this motion is made, with the strong implication by Mr. Krinsky that he reserves the question of the validity of the counterclaim. The only conclusion to be reached from this "posture" is that plaintiff's counsel have

been playing "fast and loose" with the court and with defendant's attorney.

ARGUMENT

Defendant's liability under the letter of credit is conceded and the only issue is the determination of the monetary value of defendant's counterclaim. Despite Mr. Rabinowitz' assurances to the contrary, Mr. Krinsky attempts to make the effectiveness of defendant's set off against this plaintiff an additional issue in this case, long after the validity of the set off was conceded by Mr. Rabinowitz and treated as a settled matter.

According to plaintiff's counsel, succession of its claim under the letter of credit has been as follows:

Cuban Canadian Sugar Company, nationalized by Cuba.

Banco Para el Comercio Exterior de Cuba (the nominal plaintiff) a Cuban Government entity and instrumentality.

Ministry of Foreign Trade of the Republic of Cuba, a branch of the Cuban government.

Empresa de Exportaciones, a Cuban Government agency.

Cubazucar, a Cuban Government agency.

Despite the self-serving and "bootstrapping" provisions in the Resolutions

creating the last two "successors" to the claim, whereby the attempt is made to insulate these agencies from counterclaims against the Cuban Government, it is plain that neither of these agencies can take any more, or obtain better title, than its predecessor, the ministry of Foreign Trade of the Republic of Cuba.

Since the counterclaim is obviously good against the Ministry, and Mr. Rabinowitz so conceded in stipulating to substitute the Republic of Cuba as plaintiff, any further consideration of substitution of parties is simply a waste of time.

Rule 25 of the Federal Rules of Civil Procedure provides:

> "In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party..."

There is thus no need to substitute plaintiffs. The action may be continued in the name of the original plaintiff. Any transferee, not a party to the action, will be bound by an adverse judgment, since its rights can never be better than those of its transferor. See, United States v. Griffith Amusement Co., 94 F. Supp. 747 (W.D. Oklahoma 1950); Golden State Bottling Co. v. NLRB, 414 U.S. 168, 179 (1973). Also, a judgment in favor of the transferor benefits the transferee as well.

See, Defense Supplies Corp. v. Lawrence Warehouse Co., 336 U.S. 631 (1949); Golden State, supra. Thus, any judgment obtained in this action either for or against Banco Para el Comercio Exterior de Cuba will be equally enforceable by or against any successor in interest.

CONCLUSION

As plaintiff will not be adversely affected by the denial of its motion and as substitution of parties will only serve to confuse the issues, plaintiff's motion should be denied.

Dated: New York, New York
May 29, 1975

SHEARMAN & STERLING
Attorneys for Defendant
53 Wall Street
New York, New York 10005
(212) 483-1000

Henry Harfield
Mark Zeichner
Of Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BANCO PARA EL COMERCIO EXTERIOR DE CUBA,	
Plaintiff,	Index No. 61 Civ. 410 (FvPB)
-against-	
FIRST NATIONAL CITY BANK,	
Defendant.	

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO SUBSTITUTE PLAINTIFFS.

Of Counsel & On The Brief:
MICHAEL KRINSKY, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BANCO PARA EL COMERCIO EXTERIOR DE CUBA,

Plaintiff,

-against-

FIRST NATIONAL CITY BANK,

Defendant.

Index No. 61 Civ. 410 (FvPB)

PLANTIFF'S REPLY MEMORANDUM

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO SUBSTITUTE PLAINTIFFS.

Plaintiff submits this memorandum in reply to defendant's memorandum dated May 29, 1975 opposing plaintiff's motion dated May 2, 1975 for an order substituting Cubazucar as the plaintiff herein. This reply was not previously submitted because defendant's brief was served while counsel was on vacation.

ARGUMENT

1. Defendant's argument is premised on the assertion that the Ministry of Foreign Trade - that is, the Republic of Cuba-

acquired the claim here asserted and that Cubazucar is the successor to the Ministry on this claim. From this premise, defendant argues that the identity of the plaintiff is of no consequence for the merits. As the counterclaim could be asserted against the Ministry, any successor plaintiff is also liable on the counterclaim.

The defendant's premise is totally without support and is flatly contrary to the record. As stated and proved by the Krinsky affidavit dated May 1, 1975, PP 5 - 7 and the documents attached thereto, the Ministry of Foreign Trade never acquired any interest in the claim sued upon here. Rather, certain foreign trade enterprises created by the Ministry succeeded to the claims.

Indeed, all that defendant offers is the stipulation dated July 12, 1961 allowing plaintiff to substitute the Republic of Cuba as plaintiff. However, no such substitution was in fact made. The reason is that counsel discovered his error in reading Laws Nos. 930 and 934 as transferring the instant claim to the Ministry of Foreign Trade. This is apparent from the stipulation, attached as Exhibit A to the affidavit of Michael Krinsky dated July 1, 1975, from the letter of Mr. Rabinowitz to defendant's counsel dated July 27, 1961, attached as Exhibit B and a similar letter of August 11, 1961, attached as Exhibit C. In the stipulation reference is made to the Republic of Cuba being the successor by virtue of Laws Nos. 930 and 934, both of February 23, 1961. The letters refer to resolutions of March 1, 1961. Those resolutions make abundantly clear that the

Republic of Cuba was not the successor but rather the foreign trade enterprises created by the Ministry of Foreign Trade. See Exhibit C to Krinsky affidavit dated May 2, 1975. Mr. Rabinowitz's letters indicate that the Republic of Cuba would not be substituted in light of the corrected understanding gained from those resolutions.

Even if these events indicated counsel's then belief that the Republic of Cuba was the proper plaintiff herein, such would be no bar to a substitution of plaintiffs upon the clear and undisputed record now before the court. However, it appears that counsel quickly corrected its erroneous reading of the relevant decrees.

2. Defendant claims surprise that the argument is to be made that the counterclaim does not lie against the plaintiff, whatever the liability of the Republic of Cuba. However, counsel plainly stated at the pretrial conference in this action on October 15, 1974 that Cubazucar was the proper plaintiff in this action and that it would be argued that the counterclaim does not lie against Cubazucar. See the affidavit of Michael Krinsky dated July 1, 1975.

3. Whether the counterclaim lies against the plaintiff in this action is a substantial issue of considerable importance. No decision of this or any other court has established that entities such as Cubazucar are liable for the debts of the Republic of Cuba. Nor is the decision of this court of of the Court of Appeals in Banco Nacional de Cuba v. First National City Bank applicable. Neither the present

plaintiff nor its successors, including Cubazucar, participated in any manner in the nationalization of defendant's property. The defendant has offered no reason to preclude plaintiff from litigating the issue or from doing so on a clear and adequate record.

CONCLUSION

For the foregoing reasons, plaintiff's motion to substitute Cubazucar as plaintiff herein should be granted.

Respectfully submitted,

RABINOWITZ, BOUDIN & STANDARD
30 East 42nd Street
New York, New York 10017
(212) OXford 7-8640
Attorneys for Plaintiff

Of Counsel and on the Brief:
MICHAEL KRINSKY, Esq.

Dated: New York, New York
July 1, 1975

Plaintiff's Affidavit in Conjunction with Reply Memorandum

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

BANCO PARA EL COMERCIO EXTERIOR DE CUBA,

Plaintiff,

-against-

FIRST NATIONAL CITY BANK,

Defendant.

Index No. 61 Civ. 410 (FvPB)

AFFIDAVIT

----------x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MICHAEL KRINSKY, being duly sworn, deposes and says:

1. I am an attorney associated with the firm of Rabinowitz, Boudin and Standard, attorneys for plaintiff herein. I make this affidavit in conjunction with plaintiff's reply brief in support of its motion to substitute Cubazucar as plaintiff herein.

2. In the aforesaid reply brief, reference is made to a stipulation in 1961; to

a letter dated July 27, 1961 from Mr. Rabinowitz to counsel for defendant; and a similar letter dated August 11, 1961. Those documents are attached hereto as Exhibits A, B and C, respectively.

3. Reference is also made in the aforesaid reply brief to a pretrial conference held in this action on October 15, 1974. Your affiant's notes of that pretrial conference indicate that your affiant stated that one of the issues in this action was whether the counterclaim lies against the present plaintiff and its successor, which was identified as Cubazucar.

WHEREFORE your affiant prays that the motion to substitute plaintiff be granted.

MICHAEL KRINSKY

Sworn to before me, this
1st day of July, 1975.

July 27, 1961

Charles C. Parlin, Jr., Esq.
Messrs. Shearman & Sterling
20 Exchange Place
New York, New York

Re: Banco Para etc. v. First
National City Bank

Dear Charles:

Pursuant to our conversation, I am enclosing a copy of Resolution No. 2 of March 1, 1961 in both Spanish and English.

Actually there were three Resolutions adopted on March 1st which are identical, except that the first one created Empresa Cubana de Exportaciones; the second created Empresa Cubana de Importaciones; and the third created Empresa Cubana de Fletes. So far as I can make out, there are no other differences in the Resolutions, except that the capital structure of the three enterprises, as described in paragraph FIFTH, differs slightly.

After you have had a chance to review these and the papers in the case, I will talk to you again.

Sincerely yours,

Victor Rabinowitz

VR:S

August 11, 1961

Charles C. Parlin, Jr., Esq.
Messrs. Shearman & Sterling
20 Exchange Place
New York, New York

Re: Banco Para etc. v. First
National City Bank

Dear Charles:

On July 27, pursuant to conversation, I sent you a copy of a resolution in the above matter. I think that we have the alternative now of either stipulating for a still further amendment of the complaint or I will be required to make an appropriate motion.

I am taking a vacation next week, so there is no great rush about this matter. Furthermore, if I do make a motion it will have to await Judge Bryan's return, which will not be until the latter part of September. However, I would like to get all of the loose ends cleared up in these cases and this is one of them. Will you please give the matter further consideration and let me know what you want to do about it some time before Labor Day?

Yours sincerely,

Victor Rabinowitz

VR:J

District Court Order Denying Plaintiff's Motion to Substitute

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M-840

BANCO PARA EL COMERCIO EXTERIOR DE CUBA,

Plaintiff

61 Civ. 410 (FvPB)

v.

THE FIRST NATIONAL CITY BANK

Defendant.

M E M O R A N D U M

BRYAN, DISTRICT JUDGE:

At the pre-trial conference held on July 2, 1975, two questions were left unresolved.

The first concerns plaintiff's motion pursuant to Rule 25(c) F.R. Civ. P. to substitute Empresa Cubana Exportadora de Azucar as party plaintiff in the action on the ground that it was a transferee of plaintiff's interests. Substitution of parties under Rule 25(c) lies in the sound discretion of the court. Fontana v. United Bonding Insurance Co., 468 F.2d 168, 170 (3d Cir. 1972) (per curiam); Sun-Maid Raisin Growers v. California Packing Corp., 273 F.2d 282, 284 (9th Cir. 1959); McComb

v. Row River Lumber Co., 177 F.2d 129, 130 (9th Cir. 1949); E.I. DuPont de Nemours & Co. v. Lyles & Lang Construction Co., 219 F.2d 328, 332 (4th Cir. 1952); 3B Moore's Federal Practice 25.08 at 25-322; 7A Wright and Miller, Federal Practice and Procedure § 1958 at 667.

In my view, to permit such a substitution some fourteen years after the action was commenced and some twelve years after the alleged transfer of plaintiff's interests occurred would only multiply complications in this already complicated litigation. Plaintiff's motion is denied in the exercise of discretion.

The second question is whether, at this pre-trial stage of the litigaton, the court should determine what theory or theories of valuation of the properties of defendant bank which are the subject of the set-off, should be applied in this case.

We are faced here with numerous discovery problems. It may be that a determination of what valuation theory should be applied would aid in resolving some of these problems. On the other hand, there would seem to be more problems created in the future course of the litigation than would be resolved by determining the theory-of-valuation question at this time. Defendant's request for the determination is therefore denied.

A further pre-trial conference to deal with pending discovery questions will be held at a time to be set by the court.

IT IS SO ORDERED.

United States District Judge

Dated: New York, New York
July 31, 1975

Defendant's Request for Admissions

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - x

BANCO PARA EL COMMERCIO EXTERIOR DE CUBA,

Plaintiff,

-against-

THE FIRST NATIONAL CITY BANK,

Defendant.

- - - - - - - - - - - - - - - - - x

Index No. 61 Civ. 410 (FvPB)

REQUEST FOR ADMISSION

Defendant First National City Bank ("Citibank") requests plaintiff Banco Para El Commercio Exterior De Cuba, pursuant to Rule 36 of the Federal Rules of Civil Procedure and within days of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

That each of the following statements is true:

1. The animal feed sugar purchased by Lowry & Company, Inc. of 99 Wall Street, New York, New York from a private concern in Cuba, payment for which was provided by Citibank credit number 964209 opened on August 18, 1960 (a copy of which is appended as Exhibit A), was the property of the Cuban Government.

2. The private concern referred to in paragraph 1 was nationalized by the Cuban Government.

3. The ownership of the sugar referred to in paragraph 1 was acquired by the Cuban Government through its nationalization of the private concern that had originally contracted for sale of the sugar to Lowry and Company.

4. The sugar referred to in paragraph 1 was donated to the plaintiff by the Republic of Cuba.

5. The right to receive the proceeds of the draft under the letter of credit referred to in paragraph 1 was donated to the plaintiff by the Republic of Cuba.

6. The plaintiff was the agent of the Republic of Cuba in the sale of the sugar referred to in paragraph 1 to Lowry and Company.

7. The plaintiff was the agent of the Republic of Cuba in its attempts to collect the price of the sugar referred to in paragraph 1 from Citibank.

8. The plaintiff, as beneficiary of the letter of credit referred to in paragraph 1, was acting on behalf of the Republic of Cuba.

9. The plaintiff, as beneficiary of the letter of credit referred to in paragraph 1, was acting for the benefit of the Republic of Cuba.

10. In the transaction referred to in paragraph 1, plaintiff acted solely as the agent of and on behalf of the Republic of Cuba.

11. Plaintiff is an integral part of the Republic of Cuba.

12. Plaintiff is an instrumentality of the Republic of Cuba.

13. Plaintiff is subject to the control of the Republic of Cuba.

14. In all matters which pertain to the subject matter of this action, plaintiff acted for the benefit of the Republic of Cuba.

15. In all matters which pertain to the subject matter of this action, plaintiff acted subject to the control of the Republic of Cuba.

* * *

SHEARMAN & STERLING
Attorneys for Defendant
53 Wall Street
New York, New York 10005

Plaintiff's Answer to Request for Admissions

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

BANCO PARA EL COMMERCIO EXTERIOR DE CUBA, : Index No. 61 Civ. 410 (FvPB)

Plaintiff, : ANSWER TO REQUEST

-against- :

FIRST NATIONAL CITY BANK, :

Defendant. :

----------x

Plaintiff Banco Para El Commercio Exterior de Cuba, pursuant to the Court's oral order of October 23, 1974 to respond to the request for admissions served upon plaintiff on October 23, 1974 "to the best of plaintiff's present knowledge and belief" and pursuant to Rule 36 of the Federal Rules of Civil Procedure, makes the following admissions and denials:

Request No 1. Plaintiff denies that the animal feed sugar for which payment was provided by Citibank credit number 964209 opened on August 10, 1960 was purchased by Lowry and Company, Inc., was the property of the Cuban Government or was purchased from a "private concern," except as said

latter term may have been intended to refer to Banco Para El Commercio Exterior de Cuba (hereinafter "Bancec").

Request No. 2. Plaintiff cannot admit or deny, as plaintiff is unaware of what "private concern" is referred to in Request No. 1. In the event the reference in Request No. 1 was intended to refer to Bancec, plaintiff denies said entity was ever nationalized by the Cuban Government.

Request No. 3. Plaintiff denies that the Cuban Government acquired ownership of the sugar referred to in Request No. 1 through nationalization of a "private concern" or otherwise; and denies that a "private concern" originally contracted for sale of the sugar to a purchaser (whether Lowry and Company or any other purchaser), except as said "private concern" is intended to refer to Bancec.

Request No. 4. Denied.

Request No. 5. Denied.

Request No. 6. Denied.

Request No. 7. Denied.

Request No. 8. Denied.

Request No. 9. Denied.

Request No. 10. Denied.

Request No. 11. Plaintiff denies that Bancec was an "integral part of the Republic of Cuba," except as said phrase is intended to describe the relationship between

Bancec and the Republic of Cuba established by Law No. 793 of May 4, 1960, a copy of which with English translation is attached hereto as Exhibit A; and further denies that Bancec's successor to the claim sued upon here, Empressa Cubana Exportadora de Azucar y Sus Derivados (hereinafter "Cubazucar") is an "integral part of the Republic of Cuba," except as said phrase is intended to describe the relationship between Cubazucar and the Republic of Cuba established by Resolution No. 1 of January 1, 1962, a copy of which with English translation is attached hereto as Exhibit B.

Request No. 12. Plaintiff denies that Bancec was an "instrumentality of the Republic of Cuba," except as said phrase is intended to describe the relationship between Bancec and the Republic of Cuba established by the aforesaid Law No. 793; and further denies that Cubazucar is an "instrumentality of the Republic of Cuba," except as said phrase is intended to describe the relationship between Cubazucar and the Republic of Cuba established by the aforesaid Resolution No. 1.

Request No. 13. Plaintiff denies that Bancec was "subject to the control of the Republic of Cuba" except to the extent and in the manner set forth in the aforesaid Law No. 793; and further denies that Cubazucar is "subject to the control of the Republic of Cuba" except to the extent and in the manner set forth in the aforesaid Resolution No. 1.

Request No. 14. Denied.

Request No. 15. Plaintiff denies that Bancec "Acted subject to the control of the Republic of Cuba in all matters which pertain to the subject matter of this action" except to the extent and in the manner in which Bancec was generally subject to the control of the Republic of Cuba as set forth in the aforesaid Law No. 793; and further denies that any of the provisions for control set forth in Law No. 793 were specifically exercised in regard to Bancec's actions in matters which pertain to the subject matter of this action.

* * *

Dated: New York, New York
November 5, 1974

RABINOWITZ, BOUDIN & STANDARD

By:_____
Michael Krinsky
30 East 42nd Street
New York, New York 10017
OXford 7-8640
Attorneys for Plaintiff

Transcript of the District Court Proceedings (Excerpts)

New York, New York
January 5, 1977

B E F O R E

HON. FREDERICK vanPELT BRYAN,

District Judge

APPEARANCES:

MESSRS. RABINOWITZ, BOUDIN & STANDARD
Attorneys for Plaintiff
BY: VICTOR RABINOWITZ, ESQ.
MICHAEL KRINSKY, ESQ.,
of Counsel

MESSRS. SHEARMAN & STERLING
Attorneys for Defendant
BY: HENRY HARFIELD, ESQ.
MARK ZEICHNER, ESQ.
CHARLES MANUEL, ESQ.,
of Counsel

THE COURT: All right, gentlemen, I think the best thing to do is to have each of you open briefly so that you can focus on the issues to be tried.

MR. RABINOWITZ: Your Honor, the facts relating to the plaintiff's cause of action have been reduced to a stipulation which I signed rather late last night and I don't know whether Mr. Harfield has it. He was to have made copies and so forth, but whatever may be the legal conclusions that one draws from that stipulation, at least the facts which go to in support of plaintiff's case are, I think, set forth in it and there will therefore be no occasion for us to introduce any other evidence with respect to the plaintiff's case, at least I do not--

THE COURT: Let me ask you this, Mr. Rabinowitz. Is there still an issue as to the position of the plaintiff Banco Para in terms of analogy to Banco Nacional against First National City Bank? Do you follow me?

MR. RABINOWITZ: I don't think so. Our contention here is that Banco Para is an entity which is autonomous, was created by a statute which is a part of that stipulation which I referred to a moment ago. The statute is annexed to the stipulation, and that it is an organization with an identity of its own and it has no connection with Banco Nacional. It is a wholly owned [3] instrumentality of the government of Cuba. So is Banco Nacional and so are a lot of other similar instrumentalities, but it has no connection or at least so we contend, with Banco Nacional.

I suppose that defendant may argue otherwise but at least so far as the facts are concerned, as we understand them, as we interpret them, there is no connection at all between BANCEC and Banco Nacional.

THE COURT: What about the Cuban government?

MR. RABINOWITZ: It is a wholly owned instrumentality of the Cuban government. There is no question about that. Just as we have 20 or 30 government instrumentalities which are owned entirely by the United States and just as England owns British Airways and France owns Air France and so forth and so on. I won't go through the list.

Of course, all of the eastern European countries carry on their trade through government instrumentalities and there will be some evidence on that point. But it is a wholly owned instrumentality, as I say, of the Cuban government. There is not any question about that. Its board of directors is appointed by the Cuban government. The Cuban government owns it, capitalized it, created it and so forth. There is not any argument, and all of that [4] appears from the statutes which are attached to the stipulation.

As I say, on the basis of this stipulation I think it will appear that in August of 1960 the plaintiff BANCEC entered into a contract for the sale of sugar to a company which was known as the Cuban Canadian Sugar Company. That contract is attached to the stipulation. On the same day plaintiff entered into a contract with INRA, which is another Cuban government institution for the purchase of the sugar, the same sugar. A copy of both of those contracts are annexed to the stipulation.

A few days later the defendant, Citibank, issued its irrevocable letter of credit to cover that purchase. A copy of that letter of credit is also attached to the stipulation. Thereafter the plaintiff shipped the sugar pursuant to the instructions

and it finally came to rest in Mississippi. On September 15th, which was two or three days, I think, after the receipt of the sugar in Mississippi, the defendant received from Banco Nacional, which acted as a collecting agent, a sight draft, copy of which is attached, again, to the stipulation.

There was some slight dispute concerning the amount of money that was actually due on the shipment. BANCEC originally claimed I think $217,000 but there was [5] an agreement reached within the next few hours as to the amount of money actually due and the agreement was reached that the amount due was $193,280.30. That is the amount we are suing for. And that was confirmed by cable advice between the defendant and the collecting bank, namely Banco Nacional.

All of this, all of these cables went back and forth on September 15th and 16, 1960. On the night of September 16th Citibank in Havana was nationalized by the Cuban government and was taken over. At that time Citibank, instead of paying the money to plaintiff, held the money and set it off against the amount it claimed was due to it on account of the value of its property seized.

Now, as I say, I think that our cause of action is established by this stipulation. The defendant has proffered several defenses. One of them is that Banco Nacional--in the first place, it has asserted its counterclaim. The counterclaim is that the value of its property seized by the Cuban government was in excess of the amount of this set-off, $193,000. To be more accurate, it says that the amount of its property less

the amount it has already recovered, which is something over five million dollars, is in excess of $193,000.

It contends further that the real party in [6] interest in this case is--I think it contends, I will let Mr. Harfield speak about that but I think it contends in some places in its pleadings that Republic of Cuba is the real party in interest and in some places it contends that Banco Nacional is the real party in interest.

In any event, that is Mr. Harfield's position, and Mr. Harfield contends that a second claim can be asserted in this lawsuit and the facts with respect to the value of the bank are such that nothing is due to the plaintiff here.

In reply to that contention we will argue, first, that BANCEC, being an entity with its own identity, with its own limitations of liability, with its own autonomy under Cuban law, is not responsible for the debts of the government of Cuba. Your Honor will recall that this issue was raised in the First National Bank against Citibank. We think that the situation is clearly distinguishable here.

* * *

[10]

THE COURT: All right, I will hear you, Mr. Harfield.

MR. HARFIELD: I would like to go back to the Court's initial question to Mr. Rabinowitz which, as I recall it, was whether there was remaining in this case an issue that was analagous to that of the one we had in Banco Nacional and in Chase which had to do, so to speak, with the identity of the

plaintiff, the real party in interest, and my recollection of the purport of Mr. Rabinowitz' [11] response to that was yes.

I would like, before I deal with the two issues as we see them that are raised, to touch on the underlying facts. Returning for a moment to the transaction, which was a letter of credit transaction and which I am sure that Mr. Rabinowitz' observation, which is undoubtedly correct, that this involved a sale of sugar from the plaintiff to Cuban Canadian Sugar Company, which was financed or facilitated by an irrevocable letter of credit issued by the defendant, and in that context I scarcely need to remind your Honor, particularly after your decision in 1962 in the Dulien Steel case, that banks deal in documents and not in merchandise and that the sales transaction here was not one that involved the defendant. I dwell on that because this is a point of distinction from the Sabbatino case and much of the other Cuban litigation.

As your Honor will recall, in the Sabbatino case a collection item draft accompanied by title documents was presented for payment to Farr, Whitlock, which was the broker in the transaction, and in effect what they did was to keep the documents embodying the merchandise and pay the proceeds to somebody else.

In this situation we are not dealing with a purchaser and seller. The bank undertook an engagement, through its letter of credit, that if certain documents were [12] presented it would pay a draft and it would do so for account of its customer. In this case the customer was Lowry and Company here in New York, which appears from the letter of

credit itself to be acting for the account of Cuban Canadian Sugar.

The significance of that is two-fold. First, as Mr. Rabinowitz has pointed out, the draft and accompanying documents were presented to the defendant Citibank by Banco Nacional, which apparently had the role of a collecting bank in the transaction and we will have some testimony on that. When the question of the discrepancy as to documents was resolved, and incidentally, as will appear from the description, that was not resolved until following the confiscation of the bank's branches. The chronology there, I don't know how important it is, but for the sake of order, the chronology was that the draft and documents were received by Citibank on or about the 1st of September. On the following day I believe it was, the Citibank cabled to Banco Nacional which had presented these and said there is a problem with the documents. The collection is unpaid. The parties then proceeded to negotiate, the mercantile parties. On the night of the 16th, which was a Friday, and on the 17th of September in 1960, the bank's branches were forcibly seized. The following week, and I believe it was somewhere around the 21st or 22nd, the bank's customer [13] said, "You may pay the 193,000 instead of the face amount of the draft," and a cable was received--and this was somewhere, again, around the 21st, 22nd, 23rd of September--a cable was received from the Banco Nacional saying we authorize the deduction.

Presumably they had previously instructed the bank of credit their own account with Citibank with the proceeds of the credit. On or about September 23rd they said,

we, Banco Nacional, authorize the deduction from the amount, we authorize payment in the smaller amount. Disregard our instructions to credit your account, instead pay the proceeds to Societe Generale in New York in our, that is to say, in Banco Nacional's account.

And what Citibank did--

THE COURT: What is the name of that again? I get a little confused as to names.

MR. HARFIELD: Banco Nacional--

THE COURT: What did--

MR. HARFIELD: They said to Citibank, we authorize you to pay $193,000. Instead of crediting that to our account with you in accordance with our earlier instructions, credit or pay the proceeds to Societe Generale in New York in our account. They anticipated having the funds moved over to the Societe Generale's account, their account with [14] Societe Generale, branch or agent in New York, rather than to leave it for Citibank, for I think quite obvious reasons. Mechanically what happened then was that Citibank paid the draft in the lower amount but instead of transferring the proceeds to Banco Nacional's account with Societe Generale, it offset them or purported to do so against its Cuban claims.

THE COURT: Tell me this, this is a new one on me. Societe Generale. What is that?

MR. HARFIELD: Think of it as another bank in New York. Actually it is a branch or agent of a French bank.

THE COURT: It is not a Cuban entity?

MR. HARFIELD: No, had nothing to do with Cuba.

Now, the significance of this and the reason that I dwell on these facts is that it bears on the first branch of our issue or the issue between Mr. Rabinowitz and me. The Citibank alleges that the plaintiff in this case, the real party in interest, is the Republic of Cuba or the Cuban government by whatever name it happens to be called and regardless of what the particular costume or uniform it is wearing in this suit.

The reply to that which Mr. Rabinowitz has [15] summarized is no, not at all. BANCEC, the nominal plaintiff in this case, is an autonomous entity which has no responsibility for the debts of the Cuban government and the counterclaim is therefore not properly interposed.

We shall argue, and I am satisfied that we will be able to show, first that on the basis of the statutes creating the BANCEC, on the basis of the testimony as to its activities, your Honor will be satisfied that as you said in the Banco Nacional case that for purposes of this litigation, BANCEC and the Cuban government are one and the same.

Secondly, we will show that the sugar which was involved in this transaction was Cuban government sugar and that BANCEC was in effect no more itself than a means of collecting the proceeds of Cuban government sugar and ultimately paying those proceeds to the Cuban government so that in effect BANCEC was acting here as an agent for the Cuban government in this very transaction with the conditions that the proceeds of the draft, now the subject of plaintiff's claim, with Cuban government money.

Third, and this is why I have been so wearisome on the subject of the mechanics

of this transaction, Banco Nacional presented the sight draft, a negotiable instrument, together with title documents to the Citibank [16] under the letter of credit and it instructed the Citibank to pay that draft to it as the collection agent for BANCEC. I am now following very carefully Mr. Rabinowitz' nice distinctions among the corporate entities.

We will show that as a matter of universal banking practice, a collecting bank presents documents, a draft to the paying bank. It receives the proceeds, the money on behalf of its principal. In so doing, as a matter of banking practice, any liability that the paying bank had to the principal is extinguished because it has paid the principal by paying its agent. It is then up to the agent to discharge his obligation of getting that money bank to the principal, so in this case what happened was that Banco Nacional presented a negotiable instrument, this BANCEC sight draft, to the defendant, and said, pay this, give us the proceeds, which we will then take home to our principal.

Those proceeds were paid for the account of the collecting bank and when they were offset, mechanically what happened is that the offset was against Banco Nacional's account. Now, it may well be that your Honor thinks that this has some of the appearance of formalization, of a highly technical approach, but I would put it to you that any apparent technicality of formality pales into insignificance [17] in comparison with the artificiality of suggesting that the BANCEC and Banco Nacional and the Cuban government and the Republic of Cuba are all unrelated institutions.

So this is what I would suggest is a preview of what we hope to show in connection

with the first branch of the issue.

THE COURT: In other words, I gather you are taking it, it might be described as a dual position on the plaintiff, the plaintiff's status. One, you say that under its charter and so forth, it is indistinguishable from Banco Nacional as such, and the other, you say that by the nature of this transaction in any event, this is a Cuban government transaction. Would that be a fair statement of your position?

MR. HARFIELD: Yes, Your Honor. And number three, that the actual offset was an offset to Banco Nacional's account and not to an account of BANCEC because the plaintiff had no account with BANCEC.

If I may differ with your Honor, they are not exactly alternative positions. They are, I think of it as lapstrake.

THE COURT: As supplementary positions?

MR. HARFIELD: Yes, or as the late Robert Browning said in the Soliloquy of the Spanish Cloister: "Twenty-[18] nine distinct damnations, One sure, if another fails."

* * *

[30]

MR. HARFIELD: I call Mr. Juan Sanchez.

J U A N D. S A N C H E Z, called as a witness, being first duly sworn, testified as follows:

THE COURT: You may examine, Mr. Harfield.

DIRECT EXAMINATION

BY MR. HARFIELD:

Q Mr. Sanchez, what is your present occupation?

A A consultant.

Q Were you, prior to your consultancy, employed by the First National City Bank?

A Yes, I was.

Q Would you give us just a brief personal history so his Honor will know who is talking to him?

A Yes. I was born in Spain. Came to the United States in 1920 with family at the age of 11. Went to public schools in New Brunswick, New Jersey. I am a graduate of Rutgers University, bachelor of business administration degree. Also diplomas from the American Institute of Banking and the Stonier Graduate School of Banking.

I started in a bank in 1930, the National Bank of New Jersey in New Brunswick in the credit department and I worked there until 1944 when I enlisted in the Navy. I was a lieutenant in the Navy involved with finance, [31] contract termination and also instruction at the Army and Navy Industrial College in Washington.

Came out of the Navy in the late forties, '46, stayed almost a year with the National Bank in New Jersey and joined First National City Bank in 1947, October 1, 1947, and went to Colombia, South America as assistant manager of the Bogota branch. I was there ten years in Colombia. I was manager of the branch, in charge of all the branches in Columbia and left there at the beginning of 1958 as a vice president. Went to Cuba.

May I say also that going back to the thirties and early forties, before going to the Navy, I was also an instructor and lecturer in finance and business administration at the American Institute of Banking at Rutgers University.

Since 1947 I have been employed by Citibank until I retired at the end of 1973, December 31, '73. And since then I have had two or three jobs as consultant.

Q During your time with Citibank in Cuba, would you generally describe your titles and functions there?

A The title was vice president. I was the senior officer in the country in charge of administration of all the branches, the operations of the branches and in fact as if it were a local corporation and I was its president, subject, [32] of course, to policy and directives from head office. I reported to a district vice president in New York.

* * *

[34]

Q If we may have just a little bit more [35] autobiography. You testified, I believe, that you were in Cuba from 1958 until 1960.

A Until two days after the branches were taken over.

Q Where did you go after that?

A I left there, the branches were taken over Friday night, officially Monday morning, and Monday afternoon I came to New York to head office.

Q After you returned to New York did you continue in the employ of the First National City Bank?

A Yes, I did, until my retirement.

Q How long were you stationed in New York?

A From September 1960 until I retired at the end of 1973.

Q During that period would you describe very briefly what your duties were at the head office?

A When I arrived here I was assigned to the Caribbean District, which is all the countries from Mexico, Central America, Colombia, Venezuela and all the islands, assisting the then district vice president. Two years later he retired and I assumed that position in charge of the Caribbean area until 1968, when Citibank went through a reorganization, a total reorganization of duties and I was assigned, I was by then a senior vice president and a [36] senior credit officer and I was assigned in 1958 to be in charge of correspondent banks all over the world outside of the United States. All correspondent banks outside of the continental United States.

Q So there can be no misunderstanding, when you say you were in charge of correspondent banks, does that mean that you were in charge of Citibank's relationship with them or does it mean that you supervised the operations--

A No, I am sorry. I was in charge of the correspondent bank accounts and relationship of those correspondents with Citibank.

Q Would you say again when the Citibank underwent its internal reorganization of employee functions?

A 1968.

Q During your time in Cuba as you have testified, would you describe in more particularity exactly what your duties encompassed?

A Each branch had a manager responsible for the operations of his own branch with powers delegated by me under my general power and they reported to me. I had a very small staff. I had another manager that acted as my deputy and he reviewed credits, loans up to a certain amount, correspondence,

and I depended on each manager in his own branch to run the branch in accordance with the policies and [37] our established procedures and make the reports that were required to our head office in Havana, to my staff.

Q Were you, during that period and as part of your function, familiar with the policies and the accounting procedures?

A Of First National City Bank?

Q Yes.

A Yes, sir.

Q Was it any part of your duty to maintain familiarity with the economic conditions and government operations of Cuba?

A Actually, my principal activity and responsibility, beyond supervising the management of these branches, was to represent Citibank in Cuba, know all there was necessary to know to protect Citibank's interest in Cuba and to be alert, well informed in order not only to keep our head office informed but have logically clients, international clients or others that came and would like to visit a banker and get a bird's eye view or opinion of conditions in Cuba or in any other country.

Q And in that connection did you keep yourself currently informed as to publications and the official journals and gazettes?

A It was a daily function from the official [38] gazette to other publications, journals, all means of information, reports from the Banco Nacional and other official entities.

Q Can you tell the court, based on that experience, the manner in which the Cuban government discharged its governmental functions?

MR. RABINOWITZ: Isn't that question a little broad?

THE COURT: It is a little broad. Do you mean with respect to the banking industry?

MR. HARFIELD: I will limit it to that. It is too broad but unfortunately I am trying to avoid leading.

THE COURT: I will let you lead a little bit more.

Q In the discharge of its governmental functions did the Cuban government operate through a number of agencies or instrumentalities?

A I am familiar with the banking and financing area. There was a Banco Nacional which is similar to our Federal Reserve system in this country. It was the bank of issue, the bank which had reserve requirements and supervised all banks in the country. In addition, there were other agencies such as the one that was in question here today, BANCEC, and there was another one, BANDES or [39] Banco de Desarrollo. It is the development bank such as what we had, our own RFC a few years ago.

And undoubtedly there were others, but the ones that concerned me most were Banco Nacional and the ones involved with finance and trade.

Q Had you any familiarity or awareness with BANCEC, the organization that is--

A Oh, yes, very much so.

Q Can you--

THE COURT: When you are talking about BANCEC, are you now referring to the plaintiff here or--

MR. HARFIELD: Yes, to the nominal plaintiff, your Honor.

THE COURT: To the named plaintiff.

MR. HARFIELD: Yes, to the named plaintiff.

Q Were you familiar with BANCEC?

A Yes.

Q Can you give the court your recollection of the nature and operations of BANCEC?

A We always understood, as far as we were concerned, that entity was involved in the promotion of exports from Cuba and it became very much involved before I got there in the mid-'50's when sugar was the principal export, but during my stay there it was also involved in promoting [40] other exports but entirely involved with exports on behalf of Cuba.

Q Did it have, if you know, any private functions?

A Not to my knowledge at all.

THE COURT: I think we will take the morning recess at this point.

(Recess.)

THE COURT: You may resume the stand, Mr. Sanchez.

J U A N D. S A N C H E Z, resumed.

THE COURT: Let me ask you this, Mr. Sanchez, was BANCEC engaged exclusively in your view in public functions prior to the Castro government coming in?

THE WITNESS: Oh, yes, sir. The same activities were conducted before 1959 and subsequent to 1959.

Q Subsequent to Castro's advent, was there a change in the legal structure of BANCEC?

A No, I don't recall any changes at all.

* * *

[141]

Q Just one other question.

You testified that BANCEC, who is the plaintiff in this case, had acted as an

institution, a corporation engaged in the aiding and handling of foreign trade.

A Right.

Q And that had been true even before the revolution.

A During my time in '58 and from general knowledge, the institution and its predecessors had been engaged in the same type of activities.

Q That is really what I wanted to get to and that is the predecessor. Actually, do you know when BANCEC was organized, when it was created?

A Not precisely but around 1954, '55.

Q Let me show you the stipulation here and look at the first paragraph, will you please?

A Yes. The Banco Cubano del Comercio Exterior [142] originated in 1954 for this purpose and it kept on doing it and the successor entity, indicated here of April 25, 1960 to my best knowledge and belief continued the same type of activity.

Q I just wanted to clarify the records that the plaintiff was not organized until April 1960 but it was the successor to a bank which carried on similar businesses prior to that date beginning in May 1954.

A Right, sir.

MR. RABINOWITZ: I would think that was it, your Honor.

* * *

[163]

R A U L L O P E Z, called as a witness by the plaintiff, being first duly sworn, testified as follows, through the interpreter:

THE COURT: Would you have the witness give his name.

MR. RABINOWITZ: The witness speaks pretty good English although I thought that he would be more comfortable testifying in Spanish.

My experience has been that with witnesses like this they sometimes listen to the English question rather than to the Spanish one and I just would like to advise Mr. Lopez that that young lady at your side there is going to translate it into Spanish, and she is the one you should listen to and not to me.

THE COURT: You may examine, Mr. Rabinowitz.

DIRECT EXAMINATION

BY MR. RABINOWITZ:

Q Dr. Lopez, what is your occupation?

A A lawyer in the Ministry for Foreign Trade in Havana.

Q How long have you held that position?

A Since 1965, that is to say, twelve years.

[164] Q And before that, what was your occupation?

A I was a lawyer of the Banco Nacional de Cuba, the National Cuban Bank.

Q And how long had you been employed by Banco Nacional?

A From 1953 to 1965, that is to say, twelve years also.

Q What are your duties in your present occupation?

A To advise the Ministry on commercial matters of a legal nature.

Q Do these matters relate mostly to foreign trade?

A Yes, specifically so, yes.

Q And has that been true for the last twelve years?

A Yes, but furthermore I also advise other organizations on trade matters.

Q When you say on trade matters, do you mean on foreign trade matters?

A Yes.

Q What other organizations have you advised?

A Special organizations, autonomous organizations which are exporting organizations, enterprises. There is Cubazucar, Cubaniquel and Cubaexport, and they [165] are exporting enterprises.

Q When you were employed by Banco Nacional, what kind of work did you do?

A Legal problems of banking law relating to with commercial and banking documents.

Q Dr. Lopez, are you familiar with the organization which is the plaintiff in this case, namely Banco Para El Comercio Exterior?

A Yes, I do, sir, because I was working in the bank when this case started.

Q When you say you were working in the bank, what bank do you mean?

A Banco Nacional de Cuba.

Q And are you familiar with the law which creates BANCEC?

A Yes, I am.

Q As a matter of Cuban law, is BANCEC an autonomous organization?

A Yes.

Q What does that mean?

A The BANCEC is an enterprise of an autonomous nature with an independent legal status and it has its own administration and capital.

Q Can BANCEC sue and be sued in its own name?

[166] A Yes, sir.

Q There has been testimony that BANCEC was the successor to another Cuban bank.

What was that bank?

A El Banco Cubano del Comercio Exterior.

Q Do you know when that bank was created?

A Yes, sir. In 1954.

Q Was that also an autonomous banking institution established by the laws of Cuba?

A Yes, it was autonomous but with a different character. There is a small great difference.

Q Go ahead.

A The Banco Cubano was autonomous like the Banco Nacional de Cuba was because they were created by the Constitution of 1940 which authorized the Banco Nacional, which was the central state bank, and the Banco Cubano had private participation.

The Banco Para Comercio Exterior which was set up in 1960 is an autonomous body, the capital of which was brought by the state.

MR. HARFIELD: May I ask the interpreter if the word "apartado" could also mean "contributed by"?

THE WITNESS: Supplied by the state.

And this is under the legal theory that the capital supplied be with an aim, with a purpose.

[167] Q The purposes of BANCEC are the purposes that are set forth in the statute, is that not correct, 793?

A Yes.

Q Under Cuban law is BANCEC liable for the debts of the Republic of Cuba?

MR. HARFIELD: If your Honor please, I object to the question unless it is related in some respect to what kind of debts, how arising, and in short, unless it is shown to have some relevancy to this action.

MR. RABINOWITZ: Counsel can cross-examine.

THE COURT: Yes, I think I will allow it and you can cross-examine.

A The bank is not responsible for obligations of the state and the state is not responsible for the obligations of the bank.

Q Are you generally familiar with the kinds of activities that BANCEC carried on during the time that it was in existence?

A Yes.

Q Are you familiar with the particular transaction that is involved in this case?

A Yes, particularly this one, yes.

Q Is the transaction that is involved in this case typical of the kind of activities that BANCEC carried [168] on?

A Yes.

Q Did BANCEC also have a banking business?

A It had one banking department specifically.

Q And what kind of activities did that banking department carry on?

A Financing for foreign trade, to assist exporting enterprises, private enterprises and to carry out -- to export on its own also.

I am talking specifically of banking.

You are talking specifically of banking operations?

Q That's right.

A Banking department had a very close relationship financing the Cuban exporting enterprises, both private and public and the importing ones, also.

Q Now, this was in 1960, was it not?

A Yes.

Q Were there at that time private corporations which were engaged in importing and exporting from Cuba?

A Yes.

Q Has the Republic of Cuba created other trading enterprises to carry on the export activities of the Republic of Cuba?

[169] A Yes, after the Banco Para El Comercio Exterior, the Ministry for Foreign Trade was set up and also two enterprises were set up, the names of which were Compania Cubana de Exportaciones and the Compania Cubana de Importaciones.

MR. HARFIELD: The witness spoke of the government having, I understood the Spanish word to be "created." The interpreter translated that as "set up."

Would "created" be an equally acceptable translation?

THE INTERPRETER: Yes, sir.

Q Were those two entities that you have just mentioned similarly autonomous organizations?

A Yes.

Q Have there since that time been other Cuban trading enterprises which have been created?

A Yes. When the Ministry was created, importing and exporting enterprises were created also amongst which were those already mentioned, Cubazucar, Cubaexport and Cubaniquel.

No, I apologize, not Cubaniquel. Cubaniquel was created later.

Q And in the fifteen years or so which have [170] followed, have still other autonomous enterprises, trading enterprises, been created?

A Yes.

Q Is it through those enterprises that Cuba now carries on its foreign trade?

A Yes, sir.

Q For example, when Cuba sells sugar to some foreign government, let us say to Poland, what Cuban agency is it that represents or that sells the sugar on behalf of Cuba?

Give your explanation.

A I would like to be allowed to give an explanation, please.

Q Surely.

A Cubazucar is an autonomous enterprise with its own legal status, with its own administration, and its own capital which acts without governmental functions and only on the basis of trade or commercial considerations, such as quantity, prices, specifications of the product, marketing and its operations are under its own control, but only as regards the Ministry, it is obliged to comply with the commercial policies and the supervision of the Ministry over this enterprise.

It is quite clear that this is supervision [171] and not control and Cubazucar is not responsible for the obligations of the state and the state is not responsible for the obligations of Cubazucar.

Q Are the functions that Cubazucar performs now similar to the function that BANCEC performed in the transaction at issue in this case?

A They are identical, sir.

Q Now, you have said that there are other, still other Cuban autonomous trading institutions such as Cubaniquel and others.

Do they all perform in generally the same way?

A Exactly.

Q When you sell sugar or nickel or tobacco or other products to Eastern European

countries, what is the nature of the organization that normally does the purchasing?

MR. HARFIELD: If your Honor please, if I understand the question, it is as to when one or another of the innumerable Cuban autonomous organizations sells to an Eastern European country, what is the nature of the purchasing organization.

I suggest this is rather far afield from this case.

THE COURT: I'm going to take it.

[172] A The nature of the enterprises of the other socialist states is similar and contracts take place between the two enterprises, as is normal in trade except that there are special conditions for the delivery of the goods, and that when trade takes place with capitalist countries, it is under the terms and conditions usually based on equal terms and another different aspect is the payment.

When you have agreements with either socialist or capitalist countries, the payment is through the account of the agreement and we have these agreements with all the socialist countries.

Q When you say we have, you mean the Government of Cuba has, is that right?

A Yes.

Q And when you talk about with the socialist countries, you mean trade agreements between, for example, Cuba and the Government of Soviet Union or of Poland or Rumania and so forth, is that right?

A Yes, sir.

Q Are there similar trade agreements between Cuba and any of the Western European capitalistic countries?

A Yes, similar with Spain.

Q What about England and France and West Germany?

[173] A No.

Q Do the Eastern European countries handle their exports also through government enterprises?

A They are state enterprises.

Q And they are also autonomous in the same sense that the Cuban enterprises are?

A As far as I can remember, yes, sir.

Q Now, are there other countries you have had experience with which have government enterprises which handle commercial relations on the same basis, aside from the Eastern European countries?

A Yes. Spain.

Q What about China?

A Yes, China.

MR. RABINOWITZ: May I have just a moment, please?

THE COURT: Yes.

Q When a contract is entered into for the sale of sugar, in whose name is the contract made?

A It is sold by Cubazucar.

Q And if it were tobacco that were being sold, it would be sold by another one of the enterprises, is that right?

A Cubatabaco.

[174] MR. HARFIELD: If your Honor please, again, just a point of information.

You are inquiring now, Mr. Rabinowitz, as to the circumstances today and not in 1960?

MR. RABINOWITZ: Yes.

MR. HARFIELD: The record will show that.

MR. RABINOWITZ: That's all, your Honor.

THE COURT: All right. You may examine, Mr. Harfield.

MR. HARFIELD: May I have a brief recess?

THE COURT: You may.

(Recess)

THE COURT: You may examine, Mr. Harfield.

CROSS-EXAMINATION

BY MR. HARFIELD:

Q In reviewing your testimony, I believe you said that the predecessor of BANCEC had private participants?

A The law that created the Banco Cubano authorized private participation.

Q And is it correct that Law No. 793 which created BANCEC did not authorize any private participation?

A No.

[175] Q Do you mean no, that is not correct?

A No, meaning that there is no authorized private participation as far as capital is concerned.

Q The capital was provided by the Cuban state?

A Yes.

Q What were the provisions relating to the distribution of profits?

A I would like to ask, in the Banco Para El Commercio Exterior?

Q Yes, the BANCEC.

A The profits at the end of the period were transmitted as fiscal benefits to the Cuban treasury and previously a certain amount was separated to create reserves.

Q Well, let me amend the question, then, to ask you if the net profits, after all provisions for reserves was paid to the Cuban treasury?

A Once the reserve had been separated, the rest was paid into the treasury as taxes.

Q Then do I understand that BANCEC was not obliged to pay taxes in the ordinary way?

A One of the ways of paying taxes is on the profits.

Q Perhaps the witness did not understand my [176] question.

Was in fact BANCEC exempt from the payment of taxes on its income?

A No, because it had to send its profits to the treasury as taxes.

Q Then, unlike a private business corporation, no portion of the earnings of BANCEC was taken by the government prior to distribution as profits?

A No, you are quite right, sir.

Q And all of the profits after making reserves, all of the net profits, went, for whatever reason, to the Cuban treasury?

A Yes, except for the reserves, which are reserves of capital or reserves for contingencies.

THE COURT: Let me ask a question here.

Mr. Lopez, when the profits of BANCEC were paid to the Cuban treasury, was there any fixed tax rate with respect to the payment of those profits?

THE WITNESS: No, there was no fixed rate.

Q Dr. Lopez, you have testified, I believe, that BANCEC was an autonomous enterprise?

A Yes, sir.

Q And I believe you also testified that with respect to Cubazucar the government supervised but did [177] not control?

A Yes, sir, I did say so.

Q And do I recall correctly that you said or indicated that the same pattern applied in respect of BANCEC?

A Yes.

Q That is to say, then, that BANCEC was an autonomous organization that was supervised by the Cuban Government but not controlled by it?

A Yes, sir, I did say so.

Q BANCEC was created in 1960?

A Yes.

Q And that was perhaps -- can you refresh my recollection as to the month?

A On the 4th of May, sir.

Q And thereafter BANCEC proceeded as an autonomous institution to carry out the purposes of Law No. 793 under the supervision but not under the control of the Cuban Government?

A Yes.

Q When if you know was BANCEC dissolved?

A I believe it was by Law 890.

Q And when was that law enacted?

MR. RABINOWITZ: I don't believe that law [178] is in the stipulation, is it?

MR. HARFIELD: Can we agree, I will take your guess as to when BANCEC was --

MR. RABINOWITZ: I don't want to guess. I will try to find it.

A Actually, sir, I am not quite sure whether it is Law 890 or Law 930.

THE COURT: Can you approximate the date when that law was enacted?

THE WITNESS: Yes, in October of 1960.

THE COURT: October of 1960?

THE WITNESS: Yes, sir.

Q So that BANCEC, which was created by the Cuban Government in May of 1960, was

dissolved by the Cuban Government in October of 1960, is that correct?

A Yes, sir.

Q And during the five or six months that the Cuban Government permitted it to exist, it enjoyed complete autonomy, is that correct?

A Yes, sir.

Q Now, Dr. Lopez, you have testified as to a number of successor or additional enterprises created by the Cuban Government.

A Yes.

[179] Q Can you recall any of those organizations created by the Cuban Government which were not stated to be autonomous?

A There are some that are not autonomous but they are enterprises of internal activity, domestic activity.

Q Can you tell us, if you know, Dr. Lopez, whether the characterization of enterprises that deal outside Cuba as autonomous is intended to protect the Cuban Government from liabilities it might otherwise incur?

A No, this is not precisely the aim and objective because before the revolution there were autonomous organizations already created by the Constitution of 1940. The subsequent creation of autonomous organizations or enterprises could and can be for internal or external activities.

INRA is an autonomous internal enterprise which was created in 1959. I cannot remember but there are other enterprises which are autonomous and are for internal activity.

It is the objective to fulfill that, that is taken into account, not the fact that it is for foreign activity.

Q So the determination of when an enterprise [180] created by the government is

to be characterized as autonomous or not so characterized depends upon the purpose for which the government chooses to use it?

A The National Library is an autonomous organization.

Q I think perhaps the witness has not apprehended my question because he has not answered it.

MR. RABINOWITZ: Can we have it again?

THE COURT: Yes.

(Question read)

MR. RABINOWITZ: I think the question is really argumentative, your Honor.

THE COURT: Well, let's see if he can answer it.

A I would like to mention another organization which is autonomous.

THE COURT: No, Mr. Witness. Try and answer the question that Mr. Harfield put to you, if you can.

MR. RABINOWITZ: Perhaps it would be easier if Mr. Harfield formulated it in--as a question rather than as a statement with a question mark at the end of it, you know what I mean? The way you formulated the question, it sounded as though you were merely making a statement.

[181] THE COURT: Well, let's see what the witness says.

MR. RABINOWITZ: I'm not sure the witness understands.

THE COURT: All right, let's find out.

A The decision of whether an organization is autonomous or not depends on the aim which the government is going to give such an enterprise. For instance, I could mention another autonomous organization which would

be the school canteens. It is for internal activity. It is autonomous and it is only to feed school children.

Q I don't wish to pursue the enumeration of these.

Would it be sufficient to say that your testimony has been that there was a large, a very large number of governmentally created but characterized as autonomous institutions?

A Yes.

Q And would it be fair to say that these have continued to be created during the approximately fifteen years since the revolution?

A Yes, sir.

Q So we have a period of fifteen years of [182] government fertility?

MR. RABINOWITZ: Objection.

THE COURT: Sustained.

Q Now, Dr. Lopez, with respect to BANCEC and the other enterprises which you have described as succeeding to it, my notes indicate that you testified that Cuba carried on its foreign trade through these enterprises, is that a correct recollection?

A Yes, sir.

Q And one last word on the question of autonomy, is it correct to say that in the case of an organization created by the government as an autonomous institution, that the government tells the institution what to do but not necessarily how to do it?

A The government, through the law, tells the enterprise what its objectives and functions are.

Q You have testified, Dr. Lopez, that BANCEC maintained a banking department and that BANCEC, either through that banking de-

partment or otherwise maintained close relations with private as well as public enterprises?

A Yes, sir.

Q Now, my question to you is whether the private enterprises, while they existed, had any choice as to whether they would maintain the relation with BANCEC?

[183] A BANCEC had to do with these private organizations in promotion of external trade.

Q Well, let us take an illustration, a hypothetical case.

If a private individual in Cuba in June of 1960 proposed to export sugar, would he have been permitted to deal directly with a foreign purchaser or would he have been required to sell or offer the sugar to BANCEC?

A I would like to reply to this question, not only as regards BANCEC, because before the revolution --

Q Did you say not only as regards BANCEC?

A No, what I would like to say is that BANCEC acted in the same way as ICEA, the Cuban Institute for Sugar Stablization, like ICEA, which sold to a purchaser as an exclusive seller, to promote the stablization of prices of sugar.

Q Then I presume that you are telling us, Dr. Lopez, not that there was an ability of the private party to sell on his own, but rather you are telling us that it had been so for some time, is that correct?

A Yes.

Q But is it not the fact that from the inception [184] of BANCEC, an exporter, a Cuban exporter, whether public or private, had no choice as to his ability to sell his product?

A Yes, that is so.

Q During the short life of BANCEC, did it maintain correspondent relationships with banks outside Cuba?

A Not throughout the world and this is why it used the correspondents of Banco Nacional.

Q Did it use the correspondents of Banco Nacional directly?

A Not directly. Through the Banco Nacional because they were the correspondents of the Banco Nacional and not of BANCEC.

Q Did that mean that BANCEC as such did not maintain accounts with foreign banks?

A Yes, but as far as I can remember, not in the United States.

Q Did BANCEC use the services of Banco Nacional in order to present drafts under commercial letters of credit?

A Yes, sir.

Q And, incidental to those services did BANCEC anticipate that Banco Nacional would collect the drafts and remit the proceeds to BANCEC?

[185] A Obviously.

Q Was the same procedure followed with respect to bills of exchange or drafts that were not drawn under commercial letters of credit?

A Yes.

Q Dr. Lopez, you testified that during your service with the Banco Nacional you had some familiarity with the transaction that is involved in this lawsuit, is that correct?

A Yes.

Q I show you Exhibit F which is attached to Court Exhibit No. 1 and which appears to be a contract between BANCEC and Cuban Canadian Sugar Company.

I call your attention to the item numbered 2 thereof, price, which states a

price of $3.25 per bag, and ask you if the reference was to United States dollars.

A Of course, yes.

Q Now I shall ask you to look at Exhibit G annexed to Court Exhibit No. 1, which is a contract between INRA and BANCEC, and again examining paragraph No. 2 which refers to the price, I ask you whether the price is there stated as 3 pesos and 25?

A Yes. This is in pesos because according to the law in Cuba, you had to draft in contracts of sale in [186] Cuban pesos. And the rate was at par at the time because they had the same amount of fine gold.

Q In the transaction here involved, it is stipulated that the sight draft drawn by BANCEC was transmitted for payment to Citibank through Banco Nacional.

A Yes.

Q My question to you is, upon payment of that draft, assuming, of course, that it had been paid, would Banco Nacional have remitted to BANCEC Cuban pesos?

A Not to BANCEC necessarily because BANCEC was authorized to have accounts in U.S. dollars and other countries.

Q How would Banco Nacional have accounted to BANCEC for the proceeds of the draft?

A There would have been a transfer of BANCEC in Havana to its account in dollars.

Q And is it correct that that account in dollars would have been carried on the books of Banco Nacional?

A No. Physically it could be in the vaults of BANCEC or it could be transferred into other banks abroad.

Q My question really was -- I put too many questions.

The first question is, when the proceeds were paid by Banco Nacional to BANCEC in dollars, would BANCEC [187] then have maintained those dollars as a credit balance on the books of Banco Nacional?

A Not necessarily.

Q So that upon receipt of that credit from Banco Nacional, BANCEC was free to use the proceeds to establish a dollar account wherever it chose?

A Yes.

Q And you have testified that BANCEC did not maintain any dollar accounts in the United States?

A Not in the United States as far as I can remember.

Q In the transaction involved here, BANCEC's obligation was to pay INRA in pesos, is that correct?

A Yes.

Q And BANCEC had a choice as to whether it would convert the dollars it received as a collection from Banco Nacional into pesos in order to pay that to INRA?

A Yes.

Q In the event that BANCEC had not been licensed to do so by the Cuban Government, would it have been in a position to receive and retain from Banco Nacional the dollar proceeds of its draft?

A I don't understand this because I think it is an assumption, a hypothesis.

[188] Q In August and September of 1960, was a resident of Cuba permitted to retain the dollar proceeds of merchandise it has exported?

A No.

Q Were certain institutions in Cuba permitted to dispose of dollar exchange?

A In September the Banco Nacional, BANCEC and the Fondo Para La Estabilizacion de La Moneda.

Q And those organizations that you have just mentioned were permitted under Cuban law to maintain foreign currency balances?

A Yes.

MR. HARFIELD: Thank you very much. I have no further questions.

THE COURT: All right; Mr. Rabinowitz.

REDIRECT EXAMINATION

BY MR. RABINOWITZ:

Q Law 793 is in front of you there.

A Yes.

Q Was that law published in the normal course in the Republic of Cuba? Was it published in the Official Gazette?

A Yes.

Q Are all laws that are adopted in Cuba published [189] in the Official Gazette as a matter of public notice?

A Yes. Not only for information. It is legally necessary.

Q So that this was notice to the world that Law 793 created BANCEC?

A Yes.

Q I would like to call your attention to Law 793 and particularly-- it is on page 3 of the Spanish text.

THE COURT: And that corresponds to the same page of the English text?

MR. RABINOWITZ: Yes, sir, it corresponds to the same page of the English text, and it is subdivision (h) on that page.

THE COURT: "I so pledge an encumbrance" and so forth?

MR. RABINOWITZ: No.

THE COURT: I'm trying to follow you.

Q On my copy, if we have the same law, your Honor, it says "Act as the sole exporter and importer of products or regions when so advised by reasons of national convenience" --

THE COURT: Wait a minute. That's a different "h."

MR. RABINOWITZ: Are there two "h"s?

[190] THE COURT: There is 9(h) and 8(h).

MR. RABINOWITZ: We must have different copies. In any event, it is 8(h) that I am talking about.

THE COURT: That's it.

Q Had BANCEC been given the authority under this to act as the sole importer and exporter of Cuban sugar?

A Yes.

Q Had it been so advised by reasons of national convenience at that time?

A Obviously.

MR. RABINOWITZ: That's all.

THE COURT: Mr. Harfield, anything further?

MR. HARFIELD: Nothing further, your Honor.

THE COURT: All right. Dr. Lopez may step down.

* * *

[540]

MR. HARFIELD: I then offer as Defendant's Exhibit R the stipulation which I had mentioned earlier and which I understand Mr. Rabinowitz has no objection to --

MR. RABINOWITZ: Oh, I don't know what in the world made you believe that. I certainly do have objection.

MR. HARFIELD: You nodded at me with a smile.

THE COURT: Let's see for the record.

Mr. Rabinowitz often smiles but you must not take that as indicating every time he smiles, he is not objecting. I have seen him smile when he objected.

MR. HARFIELD: Like the lady from Niger went for a ride on the tiger.

MR. RABINOWITZ: This document --

THE COURT: What is it all about, what does it deal with?

MR. RABINOWITZ: Your Honor, back in 1961, in July 1961, I proposed an amendment to the complaint in this case to substitute the Republic of Cuba for the present plaintiff and I drew a proposed complaint which did substitute the Republic of Cuba, and I obtained a stipulation from counsel which was ultimately so ordered by Judge Dimock.

[541] I had permission to serve and file a supplemental complaint to substitute the Republic of Cuba in the place of the plaintiff.

Shortly after this stipulation was entered, I realized that I had made an error and that I had misunderstood the Cuban statutes which had been passed shortly prior to that time, and I never filed an amended complaint.

I suppose that this document is being offered to show that even Rabinowitz occasionally makes errors and if that is what it is being offered to show, I will stipulate it and we don't need any exhibits.

I consider this as irrelevant as the fact that Citibank, in presenting its statement to the Foreign Claims Settlement Commission, said that there was a credit of $1,490,000 on one item which are now being knocked down to $700,000.

I am sorry that they are being able to do that but it seems to me that the fact that a mistaken statement was made in the past doesn't prevent them now from showing the truth, especially in view of the fact that I cannot claim any prejudice resulting from it.

THE COURT: Show it to me.

MR. RABINOWITZ: As I say, I don't understand [542] what the relevance of it can possibly be.

THE COURT: I would like to hear your position a little further, Mr. Harfield. This baffles me a little bit.

MR. HARFIELD: If your Honor please, the answer--

THE COURT: Here is a stipulation as to giving permission to the plaintiff to serve and file a supplemental complaint in certain form, which the plaintiff never filed.

Is that right?

MR. HARFIELD: That is right.

THE COURT: Do you say that the plaintiff is now bound by the representation contained in Paragraph 1 of that stipulation?

MR. HARFIELD: I am not asserting that he is bound by it. I am saying in view of our answer, which asserts that the Republic of Cuba is the real party in interest in this action, that a representation, until corrected on the record, that a representation that the nominal plaintiff has been dissolved and the claim transferred to the Ministry of Commerce of the Government of Cuba is certainly relevant.

As to the weight that your Honor is going to give that, that is something I can't say, but I think it is [543] certainly

relevant to the question of whether the plaintiff here is an autonomous institution that has no responsibility for the Cuban Government or whether, as we claim, it is one and the same, and the Cuban Government is the real party in interest.

THE COURT: Well, it is obviously before the Court, whether it be for identification or not, without indicating and because I am taking everything but the kitchen stove in this case, I will take it as evidence of something that happened way back in 1961 and whether or not it has any effect, I am not indicating at all because, as I understand it, Mr. Rabinowitz has consistently taken the position since then and indeed if I remember, he took the position in our pretrial conferences from time to time that his agreement or his understanding that he was going to serve an amended complaint was based, as he viewed it, on an erroneous interpretation on his part, but it is there for what it is worth.

MR. HARFIELD: And that is all I had in mind, your Honor. It is in the file of the case.

THE COURT: On that very limited basis, I will allow it.

You may mark it.

(Defendant's Exhibit R received in evidence)

[544] THE COURT: And I may say to you, Mr. Harfield, that what I am concerned with here is what the legal position of the bank is, not what somebody once said about it during the course of this rather complicated and difficult litigation.

* * *

Stipulation to the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

BANCO PARA EL COMERCIO EXTERIOR DE CUBA,

Plaintiff,

v.

THE FIRST NATIONAL CITY BANK,

Defendant.

61 Civ. 410 (FvPB)

STIPULATION

- - - - - - - - - - - - - - - - - - - x

The following facts are stipulated between the parties hereto solely for the purpose of trial in the above-captioned cause and this stipulation may be introduced as an Exhibit at said trail in lieu of proof of the contents thereof:

1. Plaintiff was organized under the laws of the Republic of Cuba by virtue of Law 793 of April 25, 1960, a copy of which, with English translation, is attached hereto as Exhibit A. Plaintiff was the successor to Banco Cubano del Comercio Exterior, which was created by Law 1425 of May 12, 1954, a copy of which, with English translation, is attached hereto as Exhibit B.

2. The Institute of Agrarian Reform (INRA) was created by the Ley de Reforma Agraria of May 17, 1959, a copy of which,

with English translation, is attached hereto as Exhibit C. Said Law was supplemented by Resolution No. 97 of December 3, 1959, a copy of which, with English translation, is attached hereto as Exhibit D.

3. On January 15, 1960, and prior thereto, the Cuban Canadian Sugar Co. (hereinafter "Cuban Canadian") owned and operated a sugar mill known as Central Rio Cauto. On January 15, 1960, Central Rio Cauto was intervened by Resolution No. 127 issued by INRA. A copy of said Resolution, with English translation, is attached hereto as Exhibit E.

4. On or about August 12, 1960, plaintiff entered into a contract in writing for the sale to Cuban Canadian of a quantity of sugar; a copy of said contract is attached hereto as Exhibit F. On the same day plaintiff entered into a contract in writing for the purchase from INRA of the sugar sold to Cuban Canadian. A copy of said contract, with English translation, is attached hereto as Exhibit G.

5. On or about August 18, 1960, defendant issued its irrevocable letter of credit, No. 964209, a copy of which is attached hereto Exhibit H.

6. Thereafter plaintiff shipped a quantity of sugar from Cuba to Pascagoula, Mississippi. Copies of the bill of lading and Special Customs Invoice are annexed thereto collectively marked Exhibit I.

7. On or about September 15, 1960, defendant received from Banco Nacional, for

collection, a sight draft drawn under defendant's irrevocable credit No. 964209, a copy of which is annexed as Exhibit J, together with documents purporting to be in compliance with the requirements of defendant's said letter of credit.

8. Upon the resolution of certain discrepancies between the documents attached to the draft and the documentary requirements of the letter of credit, defendant's customer Lowry & Co authorized defendant to pay the amount of said draft less a deduction of $23,969.20, that is to say, to pay the amount of $193,280.30, and on September 21, 1960, Banco Nacional sent defendant a cable which is annexed hereto as Exhibit K.

9. On September 20, 1960, defendant cabled Banco Nacional, asserting certain alleged rights of lien and offset. A copy of the cable is annexed hereto as Exhibit L.

10. On September 23, 1960, defendant again cabled Banco Nacional as follows:

"YOUR COLLECTION UNDER COMMERCIAL CREDIT 964209 PAID AND PROCEEDS APPLIED AS PER OUR CABLE OF SEPTEMBER 20."

Dated: New York, New York
January 5, 1977

RABINOWITZ, BOUDIN & STANDARD

Attorneys for Plaintiff
30 East 42nd Street
New York, New York 10017

SHERMAN & STERLING

Attorneys for Defendant
53 Wall Street
New York, New York 10005

[Exhibit A appears at p. 37,

Exhibit B appears at p. 3,

Exhibits C and D appear below,

Exhibit E appears at p. 33,

Exhibit F appears at p. 65,

Exhibit G appears at p. 62,

Exhibit H appears at p. 80,

and the rest of the exhibits have not been reproduced.]

Exhibit C: Republic of Cuba Executive Order of May 17, 1959

REPUBLIC OF CUBA

Executive Order

Council of Ministers

DR. MANUEL URRUTIA LLEO, President of the Republic of Cuba

Wherein: The Council of Ministers has approved and I have sanctioned the following:

Whereas: The progress of Cuba involves both the growth and diversification of industry in order to facilitate the most effective utilization of our natural resources by our citizens, as well as to eliminate our dependence on the one-crop system of agriculture, which still prevails basically and is one of the symptoms of our inadequate economic development;

And Whereas: To those ends the Revolutionary Government proposes to pass laws that will safeguard and stimulate private industry by means of protective tariffs, fiscal policies and the sound handling of public and private credit as well as to encourage other forms of industrial development, and at the same time to guide Cuban agriculture on the road to essential development and progress;

And Whereas: In all the studies that have been made for the purpose of promoting economic development, especially those undertaken by the United Nations, special attention has been given to the importance of carrying out an Agrarian Reform, insofar

as economic matters are concerned, with two main goals: (a) to facilitate and increase the growing of new crops to provide the nation's industries with raw materials and to meet food consumption requirements; to develop and expand those items of agricultural production intended for export, a source of foreign exchange for essential imports; and (b) at the same time, to increase the consumer market by means of progressive improvement in the standard of living of those people in the rural areas, in this way--by expanding the domestic market--- contributing toward the establishment of industries that are not very profitable in a limited market and to develop other lines of products that are limited for the same reason;

And Whereas: According to the opinion repeatedly expressed by the technical experts, in the case of Cuba the goals set forth in the preceding clause are attainable and, as an additional stimulus for those necessary changes in the present agrarian set-up in our country, it has become urgently necessary to rescue the great majority of the rural population of Cuba from the state of poverty in which they have traditionally struggled;

And Whereas: In Cuban agriculture frequent use is made of the sharecropping agreement and of the system of ground rents, which discourage the farmer by placing inequitable, uneconomical and in many cases extortionary olbigations upon him, thus preventing the best utilization of the land;

And Whereas: The National Agricultural Census of 1946 showed that the great majority of the farms now being cultivated are being worked by persons who do not own the land and who work it as sharecroppers, tenant farmers (including sugar cane growers), and squatters, while the ownership rights are vested in absentee landlords, a circumstance which in many cases constitutes a social injustice and in all cases represents a factor that discourages productive efficiency;

And Whereas: In the said Agricultural Census the extreme and undesirable concentration of land ownership in a few hands also became evident, and it was found that 2,336 farms represent ownership of an area of 317,000 caballerias* of land, which means that 1.5 percent of the owners possess more that 46 percent of all the farm land of the country, a situation that is still more serious if it is kept in mind that some owners possess several very large farms;

And Whereas: In contrast to the situation described in the foregoing clause, we have the phenomenon of 111,000 farms of less than two caballerias each, which comprise an area of only 76,000 caballerias, which in turn means that seventy percent of the farms occupy less than twelve percent of the nation's farm land and in addition there is a large number of farms, about 62,000, that occupy an area of less than three-fourths of a caballeria each;

---

* Translator's note: The "cabellaria" is about 33 acres.

And Whereas: It is obvious that in large farms there is a detrimental failure to utilize the natural resources, inasmuch as the soil in the cultivated areas is used in ways that produce a low yield, and too much space is devoted to large-scale cattle raising, and other areas that could be reclaimed for productive activities are left completely fallow and in some cases covered with marabu bushes;

And Whereas: It is unanimously agreed that the existence of large landholdings, as shown by the foregoing data, not only runs counter to the modern concept of social justice but constitutes one of the factors responsible for the underdeveloped, dependent structure of the Cuban economy, as can be demonstrated by pointing out various characteristics, among them the following: the fact that the national income depends on production for export, considered as the "strategic variable" of the Cuban economy, which is thus highly vulnerable to the cyclican depressions of the world economy; the strong propensity to import, including goods that under other conditions could be produced in Cuba; the consequent lessening of opportunity for profit from local investments and the reduction in our own exports; the technical backwardness of the methods of cultivation and of operating the cattle industry; in general, the low standard of living of the Cuban people and in particular of the rural population, with the consequent low purchasing power of the domestic market, which is unable, under such conditions, to encourage the development of national industry;

And Whereas: The Constitution of 1940 and the Organic Law of the Revolutionary Government prohibit large landholdings and provide that measures to abolish them permanently shall be provided by law;

And Whereas: The consitutional provisions in force provide that private property may be expropriated by the State, provided it is established that such expropriation is in the public interest;

And Whereas: It is preferable to replace the production from large landholding, which is uneconomical and based on extensive cultivation, by cooperative production, based on intensive cultivation and the use of technical methods, thereby acquiring advantages of large-scale production;

And Whereas: It is essential to establish a technical body that can apply and carry out in every detail the aims of economic development, with the resulting improvement in the standard of living of the Cuban people, in accordance with the letter and the spirit of this law;

And Whereas: It is advisable to take measures to prevent the future alienation of Cuban land to foreigners, while at the same time we hereby attest our remembrance and admiration of the patrician figure of Manuel Sanguily, the first Cuban who, as early as 1903, foresaw the terrible consequences of large landholdings and introduced a bill in the Congress of our Republic to prevent the control of Cuban resources by foreigners;

Therefore: In exercise of the powers vested in it by the Organic Law of the Republic, the Council of Ministers resolves to enact the following law to be known as the

AGRARIAN REFORM LAW OF THE REPUBLIC OF CUBA

CHAPTER I

Land in General

Article 1.--Large landholding is hereby prohibited. The maximum area of land that a natural or juridical person may own shall be thirty caballerias. Land owned by a natural or juridical person in excess of that limit will be expropriated for distribution among the peasants and agricultural workers who have no land.

Article 2.--The following land shall be exempt from the provisions of the foregoing article:

(a) Areas planted in sugar cane, the yield of which is not less than the national average plus fifty percent.

(b) Cattle-raising areas that meet the minimum standards for support of cattle per caballeria fixed by the National Agrarian Reform Institute, taking into account the breed, the time of growth, the birth rate percentage, the system of feeding, the percentage of yield of meat, after slaughter, in the case of beef cattle, or of milk in the case of milch cows. The potential production of the producing area

in question will be determined through physical and chemical analysis of the soils, their moisture content and the pattern of rainfall distribution.

(c) Areas planted in rice that, in the opinion of the National Agrarian Reform Institute, normally yield no less than fifty percent more than the average national production of the variety in question.

(d) Areas devoted to one or more crops or to a combination of agriculture and stockraising, with or without industrial activity, for the efficient exploitation of which, with a rational economic yield, it is necessary to have an area of land greater than that established as the maximum limit in Article 1 of this Law.

Notwithstanding the foregoing provisions, in no event may a natural or juridical person own land greater in area than one hundred caballeria. In cases in which a natural or juridical person owns land greater in area than one hundred caballeria, and there are two or more crops of the types listed under (a), (b), and (c) of this article on the said land, the benefit of the exemption that is established up to the maximum limit of one hundred caballeria shall be granted in such manner as the National Agrarian Reform Institute may determine, the remaining area being subject to the provisions of this Law.

With respect to the crops mentioned in sections (a) and (c), the yields referred

to shall be computed by taking into consideration the last harvest. The benefits of these exemptions shall continue as long as those levels of productivity are maintained.

In the case of the exemption indicated in section (d), the National Agrarian Reform Institute shall determine which shall be the areas in excess of the maximum limit of one hundred caballerias subject to the provisions of this Law, and shall see to it that economic unity of production is maintained and, in cases of several crops, that the correlation between them, and between the crops and the combination of agricultural and stockraising, where it exists, is also maintained.

Article 3.--The land of the State, the provinces, and the municipalities shall also be subject to distribution.

Article 4.--The following lands shall be exempt from the provisions of Article 1 and 3 of this Law:

(a) Undivided areas, possession of which has been granted to agricultural production cooperatives organized by the National Agrarian Reform Institute for the exploitation of lands of the State or lands expropriated for purposes of this Law;
(b) Those of the State, provinces, and municipalities that were used or may be used for public establishments or for general service to the community;

(c) Woodland when declared to be included in the forest reserves of the Nation, subject to use, public interest, or exploitation, as may be determined by law;

(d) Land belonging to rural communities that is intended for purposes of social welfare, education, health, and similar purposes, pursuant to a prior declaration of its nature by the National Agrarian Reform Institute, and only the amount of such land required for those purposes.

In determining the maximum limit of thirty caballerias mentioned in Article 1, the following shall not be considered: Areas necessary for industrial establishments enclosed by rural properties, including their sugar mills, offices, and dwellings; urbanized zones within rural properties, and areas by which decision of the National Agrarian Reform Institute are intended for establishing settlements or rural population centers in each Agrarian Development Zone; or where, in the opinion of the National Agrarian Reform Institute, there are other natural resources susceptible of being exploited in anticipation of the future development of the country.

Article 5.--The order of priority in each Agrarian Development Zone, for expro-

priation, when necessary, and for the redistribution of land shall be as follows:

(a) The lands of the State and those privately owned lands on which farmers are established as tenants, subtenants, tenants growing sugar cane, subtenants growing sugar cane, sharecroppers, and squatters;
(b) The excess areas of lands not protected by the exemptions contained in Article 2 of this Law;
(c) All other lands that may become subject [to this Law].

Except in the event that the National Agrarian Reform Institute issues an order to the contrary, expropriation and distribution of lands included in the section (b) shall be effected only after completion of the planned distribution of lands included in the first case and after the making of deposits in connection with an appraisal made out of court.

Article 6.--Privately owned lands up to a limit of thirty caballerias per person or entity shall not be subject to expropriation unless affected by contracts with tenant farmers who grow sugar cane, subtenant farmers who grow sugar cane, tenant farmers, subtenant farmers, and sharecroppers, or occupied by squatters, who hold parcels not larger that five caballerias in which case they also shall be subject to expropriation pursuant to the provisions of this Law.

Article 7.--Once the expropriations, grants, and sales have been made to tenant farmers, subtenant farmers, tenant farmers who grow sugar cane, subtenant farmers who grow sugar cane, and squatters established on the farm, the owners of lands subject to this law may retain the remainder of the property insofar as it does not exceed the maximum area authorized by the Law.

Article 8.--Land that has not been recorded in the Property Registries up to October 10, 1958, shall be considered property of the State.

Article 9.--State lands are all those that are recorded in the inventories of national property or acquired through a preferential right to purchase or any other right, even though the titles may not have been recorded at the Property Registries.

The Ministry of Treasury shall proceed to survey and record all lands which, under the foregoing provisions, belong to the State.

Article 10.--The action of the State to recover its lands, including "realenga" lands [lands under royal grant in excess of those granted to individuals], and those that were transferred to the Republic when it was constituted as property forming part of its patrimony, is declared imprescriptible.

Article 11.--After the promulgation of this Law, it shall be forbidden to enter sharecropping agreements, or any other agreements, in which it is stipulated that

rent for rural properties shall be paid in the form of a proportional share of the products thereof. This shall not apply to contracts for grinding sugar cane.

Article 12.--Beginning one year after the promulgation of the present Law, corporations may not operate sugar plantations if they fail to meet the following requirements:

(a) That all shares of stock shall be registered;
(b) That the holders of those shares shall be Cuban citizens;
(c) That the holders of those shares shall not be persons who appear as owners, stockholders, or officers of companies engaged in the manufacture of sugar.

After the aforementioned time limit, lands owned by corporations that do not meet the foregoing requisites may be expropriated for the purposes established in the present Law. Likewise the said corporations shall forfeit their right to such grinding quotas as they may have had when this Law was promulgated.

Article 13.--Nor may natural persons who are owners, stockholders, or officers of corporations engaged in the manufacture of sugar operate sugar plantations. The lands belonging to such persons operating sugar plantations may be expropriated for the purposes established in the present Law.

Persons who had been growers of sugar cane for a period of not less than five

years prior to their present status as owners, shareholders, or officers of companies engaged in the manufacture of sugar shall--provided they can furnish unequivocal proof thereof, and provided they do not own farms more than thirty caballerias in area--have a period of one year in which to liquidate any holdings not compatible with their present status.

Sales of the above-mentioned sugar plantations shall take place after prior approval by the National Agrarian Reform Institute, which shall authorize them only when, in the opinion of that body, it is not a question of evading the objectives of the Law.

The National Agrarian Reform Institute shall proceed to enforce this Article at the times and in the manner necessary in order to guarantee normal continuity of production.

Article 14.--Likewise, the possession and ownership of rural lands intended for any other type of agricultural and stock-raising activities by corporations the shares of which are not registered shall be prohibited.

Nevertheless, corporations that were organized when this Law was promulgated and that possess lands not intended for the growing of sugar cane may continue to utilize them until the excess areas they hold are expropriated and distributed, pursuant to the provisions of this Law, but during that period they may not for any reason convey or transfer the said lands to other corporations.

Once the said excess areas have been expropriated and distributed pursuant to the provisions of this Law, the said corporations may not continue to utilize the lands they hold unless they change their status to that of corporations with registered shares and their stockholders fulfill the conditions set out in Article 13. If the aforementioned corporations do not change their status in the manner indicated, the farms owned by them will be expropriated for the purposes of this Law.

Article 15.--Rural property may in the future by acquired only by Cuban citizens or companies formed by Cuban citizens.

Farms not larger than thirty caballerias which, in the judgment of the National Agrarian Reform Institute, are suitable for conveyance to foreign companies or entities for industrial or agricultural development considered beneficial to the development of the national economy are exempt from the foregoing provision.

In cases of hereditary conveyances of rural properties to heirs who are not Cuban citizens, such properties, regardless of their size, shall be considered to be subject to expropriation for purposes of the Agrarian Reform.

CHAPTER II

Redistribution of Lands and Indemnification of the Owners

Article 16.--An area of two caballerias for fertile land, without irrigation, distant from urban centers and devoted to crops of medium economic yield shall be established as a "vital minimum" for a peasant family of five persons.

The National Agrarian Reform Institute shall be the agency charged with establishing and deciding in each case what the necessary "vital minimum" is, starting from the aforesaid base and taking into consideration the average level of annual income it is hoped to attain for each family.

The lands that make up the "vital minimum" shall enjoy the benefits of not being subject to attachment or transfer as referred to in Article 91 of the Organic Law of the Republic.

Article 17.--Private lands subject to expropriation under the provisions of this Law and lands of the State shall be transferred undivided to the cooperatives recognized by this Law or distributed among the beneficiaries in parcels no larger than two caballerias, without prejudice to the adjustments that the National Agrarian Reform Institute may make in order to determine the "vital minimum" in each case.

All the lands, no matter to whom they may be transferred, shall be subject to payment of the taxes specified by law as a contribution to the public expenses of the nation and of the municipalities.

Article 18.--Privately owned lands cultivated by tenant farmers who grow sugar

cane, subtenant farmers who grow sugar cane, tenant farmers and subtenant farmers, sharecroppers, or squatters shall be awarded free of charge to the persons that cultivate them when their area does not exceed the "vital minimum". When the said farmers cultivate lands having an area less than the "vital minimum", the land necessary to complete it shall be awarded to them, provided it is available and the economic and social conditions of the region so permit.

If the lands cultivated in the cases mentioned in the foregoing paragraph exceed the "vital minimum", provided they do not exceed five [caballerias], the tenant farmer, subtenant farmer, tenant farmer who cultivates sugar cane, subtenant farmer who cultivates sugar cane, sharecropper, or squatter, shall receive two caballerias free of charge after their expropriation by the National Agrarian Reform Institute, and they may purchase from the owner, through a forced sale, the portion owned by him exceeding the area awarded free of charge, up to a limit of five caballerias.

Article 19.--If parcels of land smaller in area than the "vital minimum" are cultivated personally by their owners, such owners shall also be awarded free of charge the land necessary to bring the size of their holdings up to the "vital minimum", provided the additional land is available and the economic and social conditions of the region so permit.

Article 20.--The Regulation of this law shall determine the procedure to be followed

in those cases wherein the lands affected are encumbered by some lien.

Article 21.--State owned lands that are cultivated by tenant farmers, subtenant farmers, tenant farmers who grow sugar cane, subtenant farmers who grow sugar cane, sharecroppers, or squatters, shall be awarded free of charge to those in possession of them when their area does not exceed the "vital minimum".

If the cultivated lands in the cases mentioned in the foregoing paragraph exceed two caballerias, provided they do not exceed five, the tenant farmer, tenant farmer who cultivates sugar cane, subtenant farmer who cultivates sugar cane, sharecroppers, or squatter shall receive free of charge land equivalent in area to the "vital minimum", and may acquire free of charge from the State the portion of their holding that exceed the "vital minimum".

When the said tenant farmers who cultivate sugar cane, subtenant farmers who cultivate sugar cane, tenant farmers, subtenant farmers, sharecroppers, or squatters cultivate lands having an area less than the "vital minimum", they shall be awarded free of charge the land necessary to bring the size of their holdings up to the "vital minimum".

Article 22.--The lands that are available for distribution shall, in accordance with the provisions of this Law, be distributed in the following order of priority:

(a) Farmers who have been dispossessed of the land they were cultivating;
(b) Farmers residing in the region where the lands to be distributed are located, if they lack land or cultivate only an area less than the "vital minimum";
(c) Agricultural workers who habitually work and reside on the lands to be distributed;
(d) Farmers of other regions, if such farmers lack land or have holdings less in area than the "vital minimum", preference being given to those of neighboring regions;
(e) Agricultural workers of other regions, preference being given to those of neighboring regions;
(f) Any other person who makes proper application, preference being given to applicants who show that they have knowledge of agricultural matters.

Article 23.--Within the groups mentioned in the preceding article the following shall be given preference:

(a) Veterans of the Rebel Army or dependent members of their families;
(b) Members of the auxiliary corps of the Rebel Army;
(c) Victims of the war or the repression of the tyranny;
(d) Dependent members of the families of persons who have died as a consequence of their participation in the revolutionary struggle against tyranny.

In all cases, heads of families shall have priority.

Article 24.--Applications for allotment of land should be prepared on official forms in which shall be set forth the date or circumstances required by the Regulation or Instructions issued by the National Agrarian Reform Institute.

Article 25.--Owners or those in possession as owners of rural properties, the area of which, alone or in the aggregate, exceeds the maximum of thirty caballerias set by Article 1 of this Law, and likewise owners or those in possession as owners of farms of lesser extent, when they are totally or partially leased, worked under lease by sugar cane growers, operated by sharecroppers, or held by squatters shall be obliged to submit to the National Agrarian Reform Institute, directly or through the bodies authorized for that purpose, within a period of no more than three months from the date of the promulgation of this Law, the following documents:

(a) A single copy of the title deeds with the notation of the registration thereof in the Property Registry and that of the payment of the tax on rights to real estate or transmission of property;
(b) A single copy of the instrument consituting the liens and encumbrances, if any;
(c) Maps of the farm or farms or a statement that none are available;
(d) Detailed list of buildings, other structures, corrals, machinery,

agricultural implements and fences, stating the kinds thereof;

(e) A detailed declaration sworn before a notary public or the municipal judge of the place of domicile of the deponent regarding the leases, including leases with sugar cane growers, and sharecropping agreements, and concerning those [portions] occupied by squatters, affecting the farm or farms in question, stating the duration, terms, and prices, and likewise, provided it is possible, regarding the crops, heads of cattle, types of pasture, and approximate production for all items during the last five years on the said farm or farms, and the income derived from the sale of the products during the last preceding year;

(f) A list of the idle or semi-idle pieces of land which, in their judgment, are contained in the farm or farms, the excess areas in the said proportion, with a description of their boundaries and an estimate of the value thereof, being indicated, where applicable, on the annexed map or maps;

(g) In all farms with areas under intensive cultivation and benefitting from the provisions of Article 2 of this Law, the areas that are considered subject to exception by the deponent and the remaining areas subject to the Agrarian Reform shall also be specified, this to be indicated on the annexed maps, if there are such.

Notwithstanding the provisions of this article, starting with the promulgation of this Law, the National Agrarian Reform Institute may order the enforcement of its provisions with respect to the expropriation and distribution of lands, on the basis of the data it has at hand regarding privately owned lands that exceed the established limits.

Article 26.--Owners who fail to submit the documents referred to in the preceding article and/or make false statements in the sworn declaration or alter the said documents in any way shall forfeit the right to the indemnity provided by this Law, without prejudice to the criminal liability they may have incurred.

Article 27.--The authorities charged with the enforcement of this Law, with reference to the documents mentioned in Article 26, shall immediately proceed to make the pertinent investigations in order to verify the truth of the statement made therein within a period of ninety days counting from the date when the document was filed, and shall issue such resolutions as may be necessary in order to proceed with the distribution of the lands and the delivery of the corresponding titles of ownership to the beneficiary peasants.

Article 28.--After the resolutions awarding the parcels distributed to their beneficiaries have become final, they shall be recorded in the Rural Property Section of the Property Registries established by this Law. Each beneficiary shall be given his corresponding title deed with such for-

malities as may be established by the regulations of this Law. For purposes of the provisions of Article 3 of the Mortgage Law, the resolutions referred to in the preceding paragraph and which may be issued by the National Agrarian Reform Institute shall be considered to be registrable titles.

Article 29.--The constitutional right of owners affected by this Law to receive indemnization for the property expropriated shall be recognized. This indemnization shall be determined by taking into consideration the sale value of farms as shown by the municipal assessment statements dated prior to October 10, 1958. The improvements and structures on the farms that may be affected shall be subject of an independent appraisal made by the authorities charged with the enforcement of this Law. Likewise, an independent appraisal shall be made of the value of the stalks of the [sugar cane] crops in order to recompense their legitimate owners.

Article 30.--In cases in which it is not possible to determine the value in the manner provided for in the preceding article, the appraisal of the property affected shall be made by the National Agrarian Reform Institute in the manner, and through the use of the procedure, prescribed by the Regulations of this Law.

In making the appraisals and pursuant to the provisions of Article 224 of the Organic Law, there shall be appraised and deducted from the fixed value the increment produced without effort on the part of labor or private capital and solely by reason of

the action taken by the State, the Province, the Municipality, or autonomous bodies, counted from the time of the last transfer of the property and produced before this Law went into effect. Forty-five percent of the unearned increment, which, pursuant to the said constitutional provision, belongs to the State, shall be transferred to the National Agrarian Reform Institute, and the Province, Municipality, or autonomous body shall be given the proportional part due it.

The deductions that are made in favor of the National Agrarian Reform Institute shall be held for the benefit of the peasants who receive lands free of charge in the proper proportion and the remainder, if any, shall be paid into the Agrarian Reform Fund to be used according to law.

These provisions shall also apply at all auctions and forced sales of rural properties that are registrable in the manner specified in the Regulation of this Law.

Article 31.--The indemnity shall be paid in redeemable bonds. To that end an issue of Republic of Cuba bonds shall be floated in such amount, and under such terms and conditions, as may be fixed in due time. The bonds shall be called "Agrarian Reform Bonds" and shall be considered public securities. The issue or issues shall be floated for a period of twenty years, with annual interest not exceeding four and one-half percent (4-1/2%). The proper amount for the payment of interest, amortization, and expenses in connection with the issue shall be included each year in the Budget of the Republic.

Article 32.--The holders of Agrarian Reform Bonds, or the amount thereof, shall be granted ten year exemption from the Personal Income Tax on income derived from investing these bonds in new industries. It shall be the duty of the Minister of the Treasury to submit to the Council of Ministers a bill regulating such exemption.

The same right shall be granted to the heirs of the person indemnified in case they should be the ones who make such investment.

CHAPTER III

Redistributed Agricultural Property

Article 33.--Property received free of charge pursuant to the provisions of this Law may not become part of the assets of civil or mercantile companies, except for community property (of husband and wife) and the farmers' cooperatives referred to in Chapter V of this Law.

Article 34.--The properties referred to in the preceding article (acquired) by virtue of the provisions of this Law may not be transferred other than through inheritance, sale to the State, or exchange authorized by the authorities charged with its enforcement, nor be the subject of lease agreements, sharecropping agreements, usufruct, or mortgage.

Nevertheless, the State or the competent quasi-governmental bodies may grant such owners loans secured by mortgages, and financing or secured loans.

Article 35.--The new properties shall be kept as indivisible units of real estate

and in case of transfer through inheritance, they must be awarded to a single heir in the distribution of property. In case such award cannot be made without violating the rules of hereditary distribution set forth in the Civil Code, they shall be sold at public auction to bidders who are peasants or agricultural workers, the right of redemption in the manner specified in Article 1067 of the Civil Code being reserved to the heirs entitled by law to a fixed portion of the estate, if there are such heirs, and provided they are peasants or agricultural workers.

Article 36.--The ownership and possession of lands awarded under the provisions of this Law shall be governed by the rules pertaining to community property in cases of extramarital unions of a stable nature in which persons with legal capacity to contract marriage have been living together on the land for a period of not less than one year.

CHAPTER IV

Agrarian Development Zones

Article 37.--The Agrarian Development Zones shall be composed of the continuous and defined portions of the national territory in which, by a resolution of the National Agrarian Reform Institute, the said territory is divided for the purpose of facilitating the implementation of the Reform.

Article 38.--Each Agrarian Development Zone, by resolution of the same body, may

be subdivided into sections in order to facilitate the work of determining the boundaries and managing allotments and distribution as progress is made in the operations directed toward carrying out this work.

Article 39.--The National Agrarian Institute shall identify each Agrarian Development Zone by a numerical series with an initial referring to the province in which it is situated.

Article 40.--For purposes of setting up an Agrarian Development Zone and effecting redistribution or awarding of the lands, the National Agrarian Reform Institute shall take the following into consideration:

1. The area best suited to facilitate the work of real estate registration, population census, agrological studies, and surveying;
2. The agrological characteristics, the advisable production, and the facilities for improving exploitation, storage, conservation, and sale;
3. Population centers or settlements located in each zone with respect to facilities for local supplying in connection with State aid centers and the establishment and functioning of peasant farmers' associations, cooperatives, and Local Police stations;
4. Hydrological resources for supplying water and community irrigation installations under a system of water rights or cooperation;

5. The facilities for economic development and the application of technology through the development of small, supplementary rural industries or the promotion of industrial centers near the sources of raw materials and centers of distribution of the products;
6. The existing communication facilities and means of dissemination of information, news, and ideas in general, as well as the possibilities, if any, of creating them.

Article 41.--In each Agrarian Development Zone, the State shall create, with the cooperation of the heads of families or the agrarian cooperatives established therein, State aid centers supplied with agricultural machinery, equipment, granaries, storehouses, warehouses, means of transportation, fields for experimentation and breeding, aqueducts, power plants, and other aids required under plans for agrarian and industrial development; and likewise [provision shall be made] for the establishment of schools, with rooming and boarding facilities, for general education and training in agriculture, rural maternity homes, first-aid stations, dispensaries for medical and dental care, recreation rooms, libraries, athletic fields, and all the means for aiding production and culture.

Article 42.--Each Agrarian Development Zone will be considered an administrative unit of the Agrarian Reform and will be recorded in the proper book, together with all the data pertaining to it, and it will be taken into consideration for purposes of allotment of lands and determination of

those who shall be subject to the Agrarian Reform and of those excluded from it.

Likewise in organizing statistical services and taking an agricultural census every five years, consideration shall, for purposes of analysis, be given to the units of production and administration represented by Agrarian Development Zones in order to test and compare the results of the Agrarian Reform and to adopt the most suitable measures for eliminating difficulties and facilitating general progress.

CHAPTER V

Agrarian Cooperation

Article 43.--Whenever possible the National Agrarian Reform Institute will promote agrarian cooperatives. The agrarian cooperatives organized by the National Agrarian Reform Institute on lands available to it under the provisions of this Law shall be under its direction, and it shall reserve the right to appoint the managers thereof for the purpose of ensuring their better development during the initial stage of this type of economic and social organization and until greater autonomy is granted it by law.

Article 44.--The National Agrarian Reform Institute will give its support only to agrarian cooperatives formed by peasants or agricultural workers for the purpose of utilizing the soil and harvesting its products through the personal efforts of their members, pursuant to the internal regulations laid down by the said Institute. In the case of these cooperatives, the National

Agrarian Reform Institute shall see to it that they are located on land suitable for the purposes pursued and that they are willing to accept the aid and follow the guidance of the said Institute in technical matters.

Article 45.--Other forms of cooperation may include one or more of the purposes in connection with material resources, methods of work, credit, sales, preservation of products, structures to be used in common, installations, dams, irrigated lands, industrial uses of by-products and residues, and such facilities and useful methods as may lead to the improvement of the cooperatives in accordance with the regulations, decisions, and instruction issued by the National Agrarian Reform Institute.

Article 46.--The National Agrarian Reform Institute shall mobilize all the funds necessary for the development of the cooperatives, providing for those purposes long-term credits which shall be amortized at a minimum rate of interest. The Institute shall also provide short-term credits for the operation of the cooperatives, adopting financing systems suited to the economic prospects of the enterprises and always from the beginning guaranteeing an adequate income to the family.

Article 47.--The National Agrarian Reform Institute will also determine annually the share of resources that is due each Agrarian Development Zone.

CHAPTER VI

The National Agrarian Reform Institute

Article 48.--The National Agrarian Reform Institute [Instituto Nacional de Reforma Agraria, abbreviated INRA] is hereby created as an autonomous entity with its own juridical personality, for the purpose of applying and enforcing this Law.

The National Agrarian Reform Institute shall be governed by a President and an Executive Director, who shall be appointed by the Council of Ministries.

The powers and functions of the National Agrarian Reform Institute shall be as follows:

1. To make studies, to order investigations, to order and put into practice whatever measures are necessary in order to attain the objectives of the Law, issuing to that end pertinent regulations and general and special instructions;
2. To propose to the Ministry of the Treasury such tax measures for stimulating saving or consumption as may be deemed adequate for promoting the development of the production of articles derived from agriculture and stockraising;
3. To propose the margin of tariff protection required in each case for better development of products derived from agriculture and stockraising;
4. To coordinate the campaigns for improving the housing, health, and education of the rural population;

5. To determine the areas and boundaries of the Agrarian Development Zones which it decides to establish and organize;
6. To direct the preliminary studies for the distribution and awarding of lands subject to this Law, installations for State aid, the administrative set-up of each Zone, and conveyance of the lands and the deeds thereto to the beneficiaries;
7. To see to the implementation of the plans for agrarian development, awarding or distribution of lands, both with respect to the internal administration of each zone and with respect to the purposes of the Law, issuing such instructions and adopting such resolutions and measures as it may deem necessary;
8. To draft the regulations of the agricultural cooperative associations that it organizes and to appoint managers thereof, pursuant to the provisions of Article 43, to keep records and to decide questions that may arise between their members, and to take cognizance of and to decide appeals that, pursuant to the regulations, are brought as a result of opposition to resolutions or measures adopted;
9. To organize and direct the Cooperative-Training School;
10. To handle and decide, under the terms of this Law, all applications or suggestions that may be addressed to it in connection with

resettlement [of agricultural workers], awards, distribution, management, and other aspects of the Reform; classifying the applications submitted for obtaining the benefits thereof;

11. To draw up its budgets and to administer its funds, as well as those intended for implementing the Agrarian Reform;
12. To organize its own statistical services and the five-year agricultural census, compiling and publishing the results thereof for purposes of general information;
13. To organize its own offices and to issue the necessary internal regulations and to establish relations with the departments of the State, the province, the municipalities, autonomous bodies and quasi-state organizations, agrarian commissions, agrarian and industrial delegations and associations in general;
14. To establish and direct its permanent relations with such international associations as may be advisable.

Article 49.--The National Agrarian Reform Institute shall establish a department of credit for agricultural development. In turn the Agricultural Division of the Agricultural and Industrial Development Bank of Cuba shall coordinate its credit policy with the directives of the National Agrarian Reform Institute.

Article 50.--The State shall provide the National Agrarian Reform Institute with resources for the establishment of units

for the development of agricultural and livestock production throughout the country. Those units shall consist of:

(a) An Equipment and Machinery Center. The said center shall, for a moderate price, provide the services of the equipment and machinery, lease it to farmers, also at a moderate price, or facilitate its purchase by farmers.
(b) A Research Center for experimentation of an agronomical or zootechnic nature.
(c) A Technical Advisory Center for consultation by farmers.

Article 51.--All the autonomous organization in existence on the date of the promulgation of this Law, organized for the stabilization, regulation, advertising, and protection of agricultural production, will be incorporated into the National Agrarian Reform Institute as sections of its Department of Production and Foreign Trade.

Article 52.--The National Agrarian Reform Institute shall have local delegations charged with the enforcement of this Law in the areas assigned to them.

The National Reform Institute will regulate the functions of the Local Committees.

Article 53.--The National Agrarian Reform Institute shall within sixty days from the date on which it is organized, submit to the Council of Ministers the draft regulations of [execution of] this Law.

CHAPTER VII

Land Courts

Article 54.--Land Courts shall be established to hear and decide suits at law arising from the application of this Law and of others in connection with agricultural contracts and rural property in general.

The National Agrarian Reform Institute shall, within a period of three months after the promulgation of this Law, prepare a draft Organic Law covering the said Courts.

CHAPTER VIII

Preservation of Forests and Conservation of Soil

Article 55.--The State shall set aside, on the lands owned by it, forested and wooded areas necessary for national parks for the purpose of maintaining and developing forest resources. Those who have become owners of lands pursuant to this Law must observe the forestry laws and in growing their crops, must take measures to ensure the proper conservation of the soil. Owners who violate these provisions shall lose the right to the property acquired from the State free of charge; the amount corresponding to the damage caused [by negligence] shall be deducted from the indemnities to which such owners may be entitled for improvements.

CHAPTER IX

General Provisions

Article 56.--State-owned lands occupied by tenant farmers, subtenant farmers who cultivate sugar cane, subtenant farmers who cultivate sugar cane, sharecroppers, or squatters shall, to the extent that they exceed five "caballerias", be subject to distribution pursuant to the provisions of this Law, after the possessors or holders thereof have been indemnified for the improvements made on the said excess lands.

Article 57.--The preferential purchase right granted to the State by Article 89 of the Organic Law of the Republic, that is the right to acquire real property or securities, shall be exercised by the National Agrarian Reform Institute, insofar as rural property is concerned.

The Institute shall exercise said right within sixty days from the date on which it is notified of the pertinent decision of the Court, official or authority before whom the sale or forced public sale of rural property is to be held.

To that end, the judges, courts, and other officials that take part in public sales or forced transfers of rural property or securities shall, when the time is reached for making the award to a bidder, suspend the proceedings and give notice by means of an official communication to the National Agrarian Reform Institute, with a description of the property involved and the procedure followed, so that said Institute may within the time limit indicated

exercise the right of prior purchase on behalf of the State.

If the time limit has expired without the Institute exercising said right or informing the official that the Institute will not exercise it, proceedings shall take the proper legal course.

In the case of an auction or forced sale of rural property subject to the provisions of this Law, the National Agrarian Reform Institute may make payment in securities, as provided for in Article 31.

Article 58.--Tenant farmers, subtenant farmers, and squatters on rural property intended exclusively for recreational or residential purposes shall be excluded from the benefits of this Law.

Article 59.--Regardless of the disposition of the property subject to this Law, contracts for grinding sugar cane and the right of the farms to grinding quotas shall be maintained in full force, and they shall be apportioned among the new owners according to the quota corresponding to the parcel assigned to them in the distribution.

The distribution of grinding quotas referred to in the preceding paragraph shall be effected with the adjustments necessary to guarantee, in each case, the protection that the laws in force grant to small tenant farmers who grow sugar cane. The National Agrarian Reform Institute will adopt the necessary measures to guarantee the sugar mills the supply of sugar cane required for grinding.

Article 60.--In all cases in which public sales of rural properties result from

failure to fulfill financing-loan contracts or mortgage-loan contracts, any heirs of the debtor, provided they have been working on the farm sold, shall have the right of redemption; they may exercise said right within a period of one month from the date of the registration of the property.

Article 61.--In the event of the death of a presumed beneficiary, prior to or during the exercise of the rights recognized by this Law, possession of the property shall be considered transferred to the heirs without delay as set forth in Article 440 of the Civil Code. The right of protection may be secured by an injunction as set forth in Order 362 of 1900 even though the interruption or dispossession may have been caused by decision of an administrative authority.

Article 62.--Dispossession from the lands being used by the presumed beneficiaries recognized in the present Law shall be prohibited while the lands subject to the Agrarian Reform are in process of distribution.

Article 63.--In cases of testate or natural succession in which the estate consists of one or more rural properties which on January 1, 1959, had not been divided, these properties shall be considered subject to the purpose of this Law as if they were the patrimony of a single juridical person.

Article 64.--It is the interpretation of this Law that in case of doubt, the decision should be in favor of the person

working the land. This interpretation will also apply to cases in which the farmer brings suit to recover ownership or possession of the land or rights inherent in his status as a peasant.

Article 65.--Any act or contract that evades the provisions of this Law by defeating its purposes through illegal transfer, conveyances, setting aside, or merger, shall be considered null and void.

The following shall be without legal force or effect for purposes of application of the present Law: sales, setting aside or alienation of any nature effected after January 1, 1959, in favor of relatives within the fourth degree of consanguinity, or the second degree of affinity, as well as the divisions of joint ownership brought about by such relatives.

Transfers made, commencing from the aforementioned date, in favor of stockholders or partners of companies of any kind who may be relatives within the fourth degree of consanguinity or the second degree of affinity shall also be without legal value and effect for purposes of application of the present Law.

Commencing with the promulgation of the present Law, the transfers, setting aside or divisions mentioned in the preceding paragraphs will be considered null and void, even though not made between the aforementioned relatives.

Article 66.--Any practice contrary to the purposes of this Law, or the abandonment or negligent use of the lands granted pursuant to its terms is punishable by the National Agrarian Reform Institute by res-

cinding the transfer thereof, without cost and ordering the return of them to the land reserves. The application of this Article will be governed by the Regulations of this Law.

Article 67.--Tenant farmers, subtenant farmers, tenant farmers who cultivate sugar cane, subtenant farmers who cultivate sugar cane, and squatters who cultivate areas of land greater in extent than five caballerias, whether or not subject to expropriation, may acquire up to thirty caballerias, after evaluation by the National Agrarian Reform Institute, through forced sale in accordance with the procedure to be established by the Regulation of this Law, and provided they can show unequivocal proof of possession and can prove unequivocally that they were utilizing the aforementioned lands before January 1, 1959.

In the case of tenant farmers, subtenant farmers, tenant farmers who grow sugar cane, subtenant farmers who grow sugar cane, and squatters who possess and cultivate areas greater than thirty caballerias, this Law shall be applied pursuant to the provisions set out in Article 1 and Article 2.

Transitory Provisions

First: The National Agrarian Reform Institute and the Ministry in charge of the Drafting and Study of the Revolutionary Laws shall submit to the Council of Ministers within a period of six months subsequent to the date of promulation of this Law, a bill regulating the Rural Property Section of the Property Registers. Until

the said section is organized, registrations affecting rural property shall be made in the manner and in the books provided for by the Laws now in effect. Registrations that are made on behalf of the beneficiaries of the Agrarian Reform shall be free of charge.

Second: Eviction proceedings or other proceedings that have to do with dispossession of rural property shall be suspended in their present stage. If verdict has been handed down the judicial authorities handling the proceedings must notify the National Agrarian Reform Institute pending a decision as to the rights that this Law grants to the tenants.

When the rights of the defendants or tenants have been proved in the proceedings, the authorities handling the proceedings shall order that the record be filed without further action. In case the Institute should report that the defendants or tenants are not protected by the benefits of this Law, the proceedings thus suspended pursuant to the Law shall be continued.

Third: Appointment of officials contrary to the procedure [heretofore prescribed], delegating them with duties related to the Agrarian Reform, shall be null and void.

Fourth: Until such time as the Land Courts referred to in Article 54 of this Law are organized, the regular Courts shall continue to take cognizance of the cases assigned to them.

Fifth: Until such time as the Regulations of this Law become effective, they shall be carried out by resolutions of the National Agrarian Reform Institute.

Sixth: Within the six months following the promulgation of this Law, the National Agrarian Reform Institute shall submit to the Council of Ministers a bill regulating the admission of the Autonomous Bodies referred to in Article 51 of this Law.

Seventh: Within two years after this Law becomes effective the utilization of all privately-owned lands, regardless of their area, must begin. After the said period has elapsed those privately-owned lands not in production will be subject to the purposes of the Agrarian Reform, as set out in this Law.

Final Provisions

First: Ownership of the summit of Pico Turquino shall be reserved to the State and be available to the Rebel Army, together with a strip of land running West there from, having a length of one thousand five hundred meters, on which shall be erected [a tourist hotel] The Rebel Lodge, a Botanical Garden, and a small museum to recall the struggle against tyranny and to aid in keeping alive loyalty to the principles of the verterans of the Rebel Army.

Second: The provisions of the present Law are declared to be in the public and the national interest, inasmuch as this Law ensures the development of large areas of rural property, the economic development of the Nation, intensive agricultural and industrial operations, and an adequate redistribution of land among a large number of small property owners and farmers.

Third: A Rural-Property Section is hereby established in the present Property

Registers. All registrations covering rural property shall be made in the books of this Section, commencing on the date fixed by the Law that regulates its functioning.

Fourth: The National Agrarian Reform Institute shall coordinate its functions with those of the Revolutionary Army.

Additional Final Provisions

In exercise of the constituent power vested in the Council of Ministers the present Law is declared to be an integral part of the Organic Law of the Republic, which is thereby supplemented.

Accordingly, this Law is hereby given constitutional force and effect.

Therefore: I order that all parts of the present Law be implemented and enforced.

Enacted in La Plata, Sierra Maestra, on May 17, 1959, "Year of the Liberation."

MANUEL URRUTIA LLEO,
President of the Republic

FIDEL CASTRO RUZ,
Prime Minister

Roberto Agramonte Pichardo,
Minister of State

Luis Orlando Rodriquez,
Minister of the Interior

Manuel Ray Rivero,
Minister of Public Works

Raul Cepero Bonilla,
Minister of Commerce

Armando Hart Davalos,
Minister of Education

Elena Mederos Cabanas,
Minister of Social Welfare

Julio Camacho Aguilera,
Minister in charge of the
National Transportation
Corporation

Alfredo Yabur Maluf,
Minister of Justice

Rufo Lopez Fresquet,
Minister of Finance

Humberto Sori Marin,
Minister of Agriculture

Manuel Fernandez Garcia,
Minister of Labor

Dr. Julio Martinez Paez,
Minister of Public Health

Enrique Oltuski Ozacki,
Minister of Communications

Augusto R. Martinez Sanchez,
Minister of National Defense

Faustino Perez Hernandez,
Minister for the Recovery of
Misapplied Assets

Osvaldo Dorticos Torrado,
Minister in charge of Drafting
and Study of Revolutionary Laws
and Minister in charge of the Nat
Economic Council.

Luis H. Buch Rodriguez,
Secretary to the President and to the
Council of Ministers

Exhibit D: Cuban Resolution No. 97 of December 3, 1959

POWERS OF THE GENERAL ADMINISTRATOR OF SUGAR REFINERIES

Resolution No. 97 of December 3, 1959

(G.O. of December 14, 1959)

Whereas: It is necessary to outline the measures which enable the General Administrator of Sugar Refineries operated by the NIAR to carry out his duties.

Whereas: For the purposes of being able to exercise his mandate correctly, the powers inherent in the position should be determined.

Whereas: The NIAR, through its President, assisted by its Executive Director, and using the authority conferred upon it by Article 48, clause I, and the Fifth Transitory Disposition of the Law of Agrarian Reform, dictates the following:

Resolution No. 97

First: The General Administrator of Sugar Mills and Refineries operated by the N.I.A.R. in its capacity as owner, usufructuary, lessee, sublessee, occupant, intervenor, or whatever other title, will admin-

istrate, manage and direct said industrial units and whatever is attached to them, without limitations other than rendering detailed accounts for all its operations each time they may be solicited by the Department of Industrialization of the N.I.A.R. and those limitations imposed by this Resolution.

Second: He will exhibit legal representation of ordinary or judicial persons who may appear as owners, possessors, or operators of the industrial units dedicated to the manufacture of sugar, whether property of the NIRA or in the possession of said Institute under whatever capacity, as well as the sugar cane plantations belonging to these units.

Third: He will exercise his functions with the following powers:

a) He will dictate the necessary administrative norms for the commencement, development, and culmination of the sugar harvest, with subordination to those norms of a general character which the applicable Functionaries and Organisms prescribe.

b) To name, suspend, remove or reinstate the remunerated personnel, accord their remuneration in the amount and form which he judges best, grant leaves with or without salary and decree bonuses, determine the surety resolved to be required of them, inspect the acts and labors of said per-

sonnel, require accounts when judged opportune from whomever should give them due to their functions or duties; resolve questions proposed or formulated by the employees or functionaries subordinate to him.

c) To open, maintain, liquidate and close current accounts, or whatever other class of money or currency; to collect and receive sums of money, to make deposits and withdraw funds from said accounts by means of checks or other documents, approve or disapprove statements of accounts, completed operations and balances resulting for or against; to grant receipts and accords and obtain the conveyance of the paid or canceled checks and other vouchers related to said accounts.

d) To free, accept, endorse, discount, pledge as security, inscribe, negotiate, cancel, pay, collect, or to delegate for collection, evaluate, protest or not and in whatever form, transfer, cede and transmit all class of letters of credit, drafts, mandates, promissory notes, checks, bonds, and all class of exchange documentation in general.

e) To solicit and convene the opening of commercial credits, letters of credit, or sureties of whatever class in favor of persons or entities, leaving the enterprises he represents obligated to satisfy the amounts specifically endebted in relation to these administrative operations.

f) To give and receive money on loan with guarantee or without it, on installment, terms, interests and conditions which he judges applicable, being able to withdraw at any time the goods given in guarantee or to separate part of them, guaranteeing in the same form bank overdrafts.

g) To approve all class of contracts wherein the buying and selling of sugar cane and products of same is reflected, and to approve contracts for the seeding and cultivation of same, either on lands of the Sugar Mills, or Refineries, or on other lands; and to approve contracts of "refaccion" and milling of sugar cane.

h) Deposit all class of notes in Banks or public or private Institutions, withdraw these deposits or transfer them in the form he considers applicable.

i) To represent the Sugar Mills or Refineries under his administration in the National Association of Landholders, issuing the corresponding votes, accepting or opposing accords, exercising active and passive suffrage, representing them likewise before the Cuban Institute for the Stabilization of Sugar and other Official Dependencies.

j) To buy, to sell, exchange or transfer sugars, molasses and whatever other derivative product of sugar cane in whatever

form, to give them as security or guarantee pledge, and exchange with absolute liberty, the identification certificates of same.

k) To approve insurance contracts, work collectives, warehouse, freighting, brokerage, and others arising from the placement of the manufactured products in corresponding markets.

l) And that in the exercise of the aformentioned powers, to proceed to subscribe all class of public and private contracts concurrently before the Commercial or Public Notary, Consular Functionaries or functionaries of whatever type, including in said contracts, the clauses and stipulations necessary for their validity and effectiveness.

Fourth: To delegate, with prior authorization of the Department of Industrialization of the NIAR, all or whichever of the powers given to him to third parties, ordinary or judicial, without prejudice that he may exercise them together with said delegates.

Given in Havana, the third day of the month of December nineteen hundred fifty-nine.
To be published in the "Official Gazette".

BY THE NATIONAL INSTITUTE OF AGRARIAN REFORM

Dr. Fidel Castro Ruz
President of the National Institute of Agrarian Reform

Dr. Antonio Nunez Jimenez
Executive Director of the National Institute of Agrarian Reform

Amended Answer

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

BANCO PARA EL COMERCIO EXTERIOR: DE CUBA,

Plaintiff,

- against -

THE FIRST NATIONAL CITY BANK OF NEW YORK,

Defendant.

61 CIV 410

AMENDED ANSWER

- - - - - - - - - - - - - - - - - x

Defendant The First National City Bank of New York answers the complaint herein as follows:

1. Defendant has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 1 thereof except that since prior to the commencement of this action plaintiff was and all times since then has been and now is an agent and instrumentality of the Republic of Cuba wholly-owned by said Republic.

2. Admitted.

3. Defendant admits that plaintiff purports to invoke the jurisdiction of

this Court under Title 28 U.S.C. 1332 but denies knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 3 thereof that plaintiff is a foreign corporate body.

4. Defendant has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 4 thereof.

5. Defendant denies each and every allegation contained in paragraph 5 thereof except that on or about August 17, 1960 Lowry & Company, Inc. requested defendant to open a letter of credit in favor of plaintiff and that on or about August 18, 1960 defendant opened its commercial Letter of Credit No. 964209 and sent to plaintiff its advice thereof in the form annexed to the complaint herein as Exhibit A.

6. Defendant has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 6 thereof.

7. Defendant has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 7 thereof.

8. Defendant has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 8 thereof except that

on or about September 15, 1960 it received from Banco Nacional de Cuba which is like plaintiff an agent and instrumentality of the Republic of Cuba wholly-owned by said Republic, documents tendered in purported compliance with said Letter of Credit No. 964209 including a sight draft dated September 12, 1960 drawn by plaintiff upon defendant to the order of plaintiff in the amount of $217,249.50.

9. Defendant denies each and every allegation contained in paragraph 9 thereof.

10. Defendant denies each and every allegation contained in paragraph 10 thereof.

FOR A FIRST COMPLETE DEFENSE AND AS A SETOFF AND COUNTERCLAIM THE DEFENDANT ALLEGES:

11. This action is brought by and for the benefit of the Republic of Cuba by and through its agent and wholly-owned instrumentality, the plaintiff herein, which is in fact and law and in form and function an integral part of and indistinguishable from the Republic of Cuba.

12. In and before the year 1898 the territory of the Republic of Cuba was a colony of the Kingdom of Spain. In or about April 1898 the peoples of the territory of Cuba asserted their right to

independence. On or about April 20, 1898 the United States of America recognized the independence of the peoples of Cuba.

13. In consequence of such recognition the United States of America engaged in war with the Kingdom of Spain and carried on such war for and on behalf of the peoples of Cuba until the peoples of Cuba had been liberated. On December 10, 1898, the Treaty of Paris was duly executed by the United States of America and the Kingdom of Spain, and pursuant to such Treaty the Kingdom of Spain withdrew all of its forces, both military and civil, from Cuba.

14. By reason of the action of the United States of America, the peoples of Cuba were emancipated and were enabled to and did establish an autonomous government for themselves and for the area of Cuba. The United States of America recognized the autonomous government of the Republic of Cuba upon its creation and has continued to extend recognition to the successor lawful governments of the Republic of Cuba.

15. From the inception of the said independent Republic of Cuba, the laws of Cuba have provided for the private ownership of property and for the protection of rights concerning such private property; and by its establishment and administration and enforcement of such laws and otherwise, the Republic of Cuba initially and until

the latter part of the year 1960 represented that it would protect and preserve all businesses legally established within the Republic of Cuba and all private rights acquired therein and would protect and defend all such businesses lawfully carrying out the legitimate objects thereof, and that it was and at all times would be ready, willing and able to meet all of its international commitments and otherwise conform to the Law of Nations.

16. In reliance upon the representations made by the Republic of Cuba for the protection of property and property rights and upon its integrity, good faith and dedication to the principles of freedom, all as hereinabove set forth in paragraph 15 hereof, and pursuant to the laws of Cuba and to Section 25 of the Federal Reserve Act, the defendant, in or about August, 1915, opened a branch of its banking business in the City of Havana, Cuba, for the purposes of carrying on the business of banking in furtherance of the foreign commerce of the United States, and for the provision of banking services and facilities for the business activities of Cuba and its inhabitants and the development of its natural resources and trade, all of which comprise the economy of the Republic of Cuba; and in further reliance on said representations, defendant continued to invest in the Republic of Cuba additional funds and to open and operate additional branches, and on September 16, 1960 defendant maintained and operated

eleven distinct and separate branches within the Republic of Cuba.

17. On or about December 31, 1958 a new government calling itself the Revolutionary Government of Cuba and being under the leadership of one Fidel Castro assumed de facto control of Cuba and on or about January 7, 1959 the United States of America formally extended recognition to Castro's Revolutionary Government.

18. Subsequent to January 7, 1959, the Republic of Cuba formally and expressly reaffirmed its representations, assurances and guaranties with respect to the preservation of private property and with respect to the other matters set forth in paragraph 15 hereof, and to this end on or about February 17, 1959 the Republic of Cuba by the said Revolutionary Government promulgated the Fundamental Law of Cuba, Articles 24 and 87 of which provided and still provide, in English translation, as follows:

> "Article 24. Confiscation of property is prohibited, but it is authorized for the property of the Tyrant deposed on December 31, 1958 and of his collaborators, of natural or juridical persons responsible for crimes commited against the national economy or the public treasury, and those who are enriched or have been enriched unlawfully under the protection of the public power. No other natural

or juridical person can be deprived of his property except by competent judicial authority and for a justifiable reason of public benefit or social interest and always after payment of appropriate compensation in cash, fixed by court action. Non-compliance with these requirements shall give the person whose property has been expropriated the right to protection by the courts and, if the case warrants, to restitution of his property.

"The reality of the grounds for public benefit or social interest and the need for expropriation shall be decided by the courts in the event of challenge."

"Article 87. The Cuban State recognizes the existence and legitimacy of private property in its broadest concept as a social function and without other limitations than those which, for reasons of public necessity or social interest, are imposed by law."

19. On or about August 17, 1960 Lowry & Company, Inc. requested defendant to open a letter of credit in favor of plaintiff in the amount of $650,000. Defendant complied with such request and on or about August 18, 1960 established its commercial Letter of Credit No. 964209.

20. On or about September 15, 1960 defendant received from Banco Nacional de Cuba documents tendered in purported compliance with the requirements of defendant's said Letter of Credit No. 964209.

21. Upon examination of said documents defendant determined that they were not in compliance with Letter of Credit No. 964209 and on or about September 16, 1960 defendant so advised Banco Nacional de Cuba.

22. On September 16 and 17, 1960 the Republic of Cuba forceably seized and took from the defendant all of the branch offices and the business and property of defendant in the Republic of Cuba, and declared itself substituted for and subrogated in place and stead of the defendant with respect to such property and rights as well as the entire assets and liabilities of defendant within the Republic of Cuba, without the consent of the defendant but against its will, and without compensation of any sort whatsoever.

23. The seizure by the Republic of Cuba of the defendant's property within the territory of the Republic of Cuba as alleged in paragraph 22 hereof was discriminatory, confiscatory and in violation of international law, and the laws of the United States, and the laws of the Republic of Cuba itself.

24. Thereafter the Government of the United States of America protested

against the action alleged in paragraph 22 hereof and declared such action to have been forced expropriation taken under color of a discriminatory, confiscatory and arbitrary law.

25. On or about September 22, 1960 defendant received from Banco Nacional de Cuba a cable reading in part as follows:

> "13002 REFERRING YOUR CABLE OF 9/16 OUR COLLECTION FOR US DOLLARS 217,249.50 UNDER YOUR IRREVOCABLE CREDIT 964209 WE AUTHORIZE DEDUCTION FOR DEMURRAGE AND DIFFERENCE IN WEIGHT UP TO US DOLLARS 23,969.20"

26. On or about September 22, 1960 defendant, with the express consent of Lowry & Company, Inc. and in reliance upon the authorization of Banco Nacional de Cuba set forth in the preceding paragraph hereof waived the non-compliance of the documents presented under Letter of Credit No. 964209; made payment under said Letter of Credit in the agreed amount of $193,280.30 (which sum represented the amount of the draft presented less the authorized deduction of $23,969.20 as alleged in the preceding paragraph hereof); and thereby performed all of its obligations and discharged all of its liabilities with respect to said Letter of Credit No. 964209.

27. Thereupon defendant became indebted to the Republic of Cuba in the

amount of the proceeds of said Letter of Credit No. 964209, namely, $193,280.30.

28. On or about September 22, 1960 defendant applied the amount owing by it to the Republic of Cuba as aforesaid as an offset to its claim against the Republic of Cuba for the value of its property seized by the Republic of Cuba.

29. On or about September 23, 1960 defendant sent a cable to Banco Nacional de Cuba which read as follows:

> "YOUR COLLECTION UNDER OUR COMMERCIAL CREDIT 964209 PAID AND PROCEEDS APPLIED AS PER OUR CABLE SEPTEMBER 20"

"OUR CABLE SEPTEMBER 20" referred to in said cable of September 23, 1960 was a cable which defendant had sent to Banco Nacional de Cuba on September 20, 1960 reading as follows:

> "THIS IS TO NOTIFY YOU THAT IN VIEW OF ACTION TAKEN RESPECTING OUR BRANCHES IN CUBA WE HAVE EXERCISED OUR RIGHTS OF LIEN AND OFFSET AND CLOSED YOUR ACCOUNTS AS OF SEPTEMBER 17"

30. At all times mentioned herein Banco Nacional de Cuba was and it now is an agent and instrumentality of the Republic of Cuba wholly-owned by said Republic, and all acts herein alleged to have been done

either by plaintiff or by said Banco Nacional de Cuba were in law and in fact done by and for the benefit of the Republic of Cuba.

31. On January 3, 1961 the Government of the United States severed diplomatic relations with the Government of the Republic of Cuba on the ground that the harassment and vilification by the said Government of the Republic of Cuba had passed endurance and thus indicated that the normal courtesies extended between friendly nations would not be continued as to the Republic of Cuba.

32. By reason of the matters hereinbefore set forth, the defendant has been damaged by the wrongful and tortious acts of the Republic of Cuba in an amount substantially in excess of the amount claimed in the complaint herein but at present indeterminable, and the defendant is entitled to setoff against such damages the amount claimed in the complaint herein, leaving a balance due and owing from the Republic of Cuba to the defendant.

FOR A SECOND COMPLETE DEFENSE AND AS A SETOFF AND COUNTERCLAIM THE DEFENDANT ALLEGES:

33. It repeats and realleges each and every allegation contained in paragraphs 11 through 31 hereof.

34. The reasonable value of the business and property of defendant in the Republic of Cuba, at the time of the seizure thereof by the Republic of Cuba, was substantially in excess of the amount claimed in the complaint herein. The Republic of Cuba promised to and was obligated by international law to pay prompt, adequate and effective compensation to defendants and others whose property it seized and to discharge the liabilities to defendant and others assumed by the Republic of Cuba in connection with or arising out of its seizure of defendant's said business and property, including, without limitation, contingent liabilities to defendant on account of letters of credit issued by defendant's branches and payable at or by defendant outside the Republic of Cuba.

35. No part of such compensation has been paid to defendant nor has the Republic of Cuba discharged any of its said liabilities to defendant but, on the contrary, the Republic of Cuba has repudiated its obligation to make such payment and has waived the necessity of any demand therefor.

36. By reason of the matters hereinbefore alleged, the Republic of Cuba is indebted to the defendant in an amount substantially in excess of the amount claimed in the complaint herein but at present indeterminable, and the defendant is entitled to setoff against such indebtedness the amount claimed in the

complaint herein, leaving a balance due and owing from the Republic of Cuba to the defendant.

FOR A THIRD COMPLETE DEFENSE THE DEFENDANT ALLEGES:

37. The real party in interest is not Banco Para El Comercio Exterior de Cuba, the plaintiff herein, but the Republic of Cuba. The action must be dismissed because it is not being prosecuted in the name of the real party in interest.

WHEREFORE, the defendant demands judgment herein:

1. Dismissing this action with prejudice;

2. Adjudicating that the Republic of Cuba is liable to the defendant in an amount in excess of the amount specified in the complaint herein, without prejudice to the defendant's rights at any subsequent time, through diplomatic channels or in an international forum, in any forum in any foreign nation, or in any court in the United States, to assert such liability of the Republic of Cuba either through affirmative relief or as a matter of defense, offset, counterclaim, or by such other means as may from time to time be available to it;

3. For such other, further and different relief as to the Court may seem just.

Dated: New York, New York
January 20, 1977

SHEARMAN & STERLING

By_____
Member of the firm
Attorneys for defendant
53 Wall Street
New York, N.Y.

Reply to Amended Answer

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

BANCO PARA EL COMERCIO EXTERIOR DE CUBA,

Plaintiff,

-against-

61 Civ. 410 (FvPB)

REPLY TO AMENDED ANSWER

FIRST NATIONAL CITY BANK,

Defendant

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Plaintiff, for its reply to the defendant's amended answer served January 20, 1977, alleges:

AS A REPLY TO THE FIRST COUNTER-CLAIM ALLEGED IN PARAGRAPHS 11-32 OF THE ANSWER, THE PLAINTIFF:

1. Denies each and every allegation contained in paragraphs 11, 23, 26, 27, 28, 29, 30 and 32 of the Answer.

2. The allegations contained in paragraphs 12, 13, 14 and 15 of the Answer all relate to historical facts allegedly occurring prior to the establishment of plaintiff and to matters not within the corporate knowledge of plaintiff or the personal knowledge or memory of its officers. Therefore the plaintiff denies know-

ledge or information sufficient to form a belief as to the allegations in said paragraphs.

3. Denies each and every allegation contained in paragraph 16, except admits that the defendant in or about August, 1915 opened a branch of its banking business in the City of Havana, Cuba; that among the purposes of said branch was to carry on the business of banking; and that on September 16, 1960 the defendant maintained and operated 11 branches within the Republic of Cuba.

4. Denies each and every allegation contained in paragraph 17 of the Answer, except admits that on or about July 7, 1959 the United States of America formally extended recognition to the present Government of Cuba.

5. Denies each and every allegation contained in paragraph 18 of the Answer, except admits that on or about February 17, 1959 the Republic of Cuba promulgated a law entitled "Fundamental Law"; plaintiff refers to said law for its contents.

6. Denies knowledge or information sufficient to form a belief as to the allegations of paragraphs 20, 21, 24 and 25 of the Answer.

7. Denies each and every allegation contained in paragraph 22 of the Answer, except admits that on or about September 16, 1960 the business and property

of the defendant in the Republic of Cuba were nationalized.

8. Denies each and every allegation contained in paragraph 31 of the Answer, except admits that on January 3, 1961 the Government of the United States severed diplomatic relations with the Government of the Republic of Cuba.

AS A REPLY TO THE SECOND COUNTERCLAIM ALLEGED IN PARAGRAPHS 33-36 OF THE ANSWER, THE PLAINTIFF:

9. Repeats and realleges each of the denials and admissions set forth herein above.

10. Denies each and every allegation contained in paragraphs 34, 35 and 36 of the Answer.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE TO EACH OF THE COUNTERCLAIMS ALLEGED BY DEFENDANT IN ITS ANSWER, PLAINTIFF ALLEGES:

11. The allegations set forth in each of said counterclaims do not state claims upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE TO EACH OF THE COUNTERCLAIMS ALLEGED BY DEFENDANT IN ITS ANSWER, PLAINTIFF ALLEGES:

12. Plaintiff is an autonomous financial institution which under the laws of the Republic of Cuba is not responsible for the obligations of the Republic of Cuba.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE TO EACH OF THE COUNTERCLAIMS ALLEGED BY DEFENDANT IN ITS ANSWER PLAINTIFF ALLEGES:

13. To the extent, if any, to which plaintiff may be responsible for the obligations of the Republic of Cuba, it is entitled to immunity from suit in a court of the United States.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE TO THE SECOND COUNTERCLAIM ALLEGED BY DEFENDANT IN ITS ANSWER PLAINTIFF ALLEGES:

14. Insofar as said Amended Answer purports to allege a right of action or rights of action not alleged in the original Answer filed herein, plaintiff alleges that the right of action set forth in said counterclaim did not accrue within six years next before the filing of the Amended Answer here in.

WHEREFORE, plaintiff demands judgment against the defendant:

(a) dismissing the defendant's counterclaims;

(b) awarding judgment to the plaintiff in the sum demanded by the complaint; and

(c) awarding the plaintiff interest and the costs and disbursements of this action.

RABINOWITZ, BOUDIN & STANDARD

By:_____
VICTOR RABINOWITZ, Esq.
30 East 42nd Street
New York, New York 10017
(212) OXford 7-8640
Attorneys for Plaintiff

Dated: New York, New York
January 25, 1977

Exhibit O to the District Court's Exhibit 2: Cuban Resolution No. 2 Under Law No. 851

Resolution No. 2 under Law No. 851 of Republic of Cuba

(Document No. 11)

Department of State
(Translation)

(From the Gaceta Oficial of the Republic of Cuba, Special Edition, September 17, 1960, pp. 1-2)

Executive Power

Resolution No. 2

Whereas: Law No. 851 of July 6, 1960, published in the Gaceta Oficial of July 7, authorized the undersigned to order jointly, whenever they consider it necessary to the defense of the national interest, the nationalization, by means of expropriation, of the assets and companies owned by natural or juristic persons who are nationals of the United States of America, or of companies in which the said persons have an interest or participation, even though the said companies were constituted in accordance with Cuban laws.

Whereas: It is not possible to allow a large share of the nation's banking to remain in the hands of the imperialist interests which, in an act of cowardly and criminal aggression, inspired the reduction of our sugar quota.

Whereas: Subsequent to the reduction of the sugar quota, the government of the United States of America and the representatives of monopolistic interest of

that country repeatedly committed acts of open aggression against the Cuban economy, such as those involving the curtailment of trade between the two countries, which had the obvious purpose of hampering the economic development of Cuba; and the imposition of embargoes on commercial aircraft owned by Cuban companies, under the legal guise of claims against civil debts, but which have the implicit purpose of curtailing our vital means of international communication, in an increasingly greater effort to isolate our country.

Whereas: One of the most efficient instruments of that imperialistic interference in our historical development has been typified by the operations of the American commercial banks, which have served as a financial vehicle, to facilitate the monopolistic activities of the American companies in Cuba and the massive invasion of our country by imperialistic capital through usurious loans, which, far from promoting our economic growth, brought about in times of emergency numerous lawsuits resulting in the seizure of our national wealth by that imperialistic capital.

Whereas: It has always been the financial policy of these banks to encourage the activities of the American companies that devote their efforts to the procurement of our natural resources, the exploitation of our land by holders of large estates, and the mercantile operations that have contributed to the growing trend toward importing American manufactured goods, to the extent that it has hindered the development of national industries and has

forced our economy to become dependent on a single crop and a single export.

Whereas: All this proves that the activities of American banks in Cuba have been a decisive factor in the disruption of our economic structure.

Whereas: It is unquestionable that the continuation of American banking interests in Cuba, a typical example of the imperialistic phenomenon, constitutes an obstacle to national liberation.

Whereas: In addition to the facts already stated, there is the deliberate practice of the United States Government designed to facilitate and to encourage, within its own territory, counter-revolutionary activities by war criminals and fugitive traitors.

Whereas: Furthermore, the work of international espionage in Cuban territory has been intensified under the sponsorship of that Government, with notorious contempt for international law and with the obvious intention of promoting conspiratorial activities in our country.

Whereas: All these acts are undertaken for the purpose of destroying the great achievements of the Cuban Revolution, in the wicked hope of again subjecting our country to imperialistic oppression.

Whereas: We the undersigned realize that we should exercise the authority vested in us, and that we should proceed, in responsible discharge of the revolutionary

duty, to nationalize all the American banks operating in our country, thus advancing still further on the road undertaken by our people, with firm patriotic will, toward the total economic independence of our nation.

Now, therefore: Exercising the authority vested in us, in accordance with the provisions of Law No. 851 of July 6, 1960,

We Resolve:

First: To order the nationalization, by expropriation, and consequently, award to the Cuban Government, in absolute ownership, all the assets, rights and shares deriving from the utilization thereof, especially the banks, including all their branches and agencies located in Cuba, which are the property of the following legal persons:

1. The First National City Bank of New York

2. The First National Bank of Boston

3. The Chase Manhattan Bank

Second: Accordingly, the Cuban State is hereby declared subrogated in the place and stead of the natural or juristic persons listed in the preceding paragraph with respect to the above mentioned property, rights, and rights of action, and to the assets and liabilities forming the capital of the above mentioned companies.

Third: It is hereby declared that these expropriations are carried out for the reasons of public necessity and national interest stated in the "Whereas" clauses of the present Resolution.

Fourth: Pursuant to Article 3 of Law No. 851 of July 6, 1960, the President of the National Bank of Cuba is assigned to take over, with all the authority inherent in his office, the administration of the assets and banking businesses which are the subject of the action decreed in the present Resolution.

Fifth: The President of the National Bank shall designate officers of his own choosing to administer, on his behalf, the said assets and business, with no limitation whatsoever, including those of the branches or agencies of the banking institutions, and after taking over the said administration they shall notify the undersigned, who shall then assign experts to estimate the value of the confiscated assets with a view to payment thereof in the manner prescribed in Law No. 851 of July 6, 1960.

Sixth: It is hereby declared, for the purposes of the provisions of Article 23 of Law No. 13 of December 23, 1948, which created the National Bank of Cuba, that as a result of the expropriation ordered in this Resolution, the Council Member appointed by the Foreign Banks shall cease to represent the nationalized banks in the Council, without prejudice to the representation therein of other foreign banks not affected by the present Resolution.

Seventh: The President of the National Bank of Cuba is hereby authorized to issue the pertinent notices to the legal representatives of the juridical persons affected, and to carry out the provisions of the present Resolution.

Eighth: As a result of the adjudication in favor of the Cuban Government of the businesses, assets, rights, and shares referred to in the present Resolution, the President of the National Bank of Cuba is hereby authorized to issue the pertinent directives to the Registrars of Property, Corporate and Mercantile Deeds in order that the proper entries may be made in their registers.

Done at Habana on September 17, 1960.

Osvaldo Dorticos Torrado
President

Fidel Castro Ruz
Prime Minister

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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BANCO NACIONAL DE CUBA,
: 60 Civ. 4663-CLB
Plaintiff,
:
-against-
:
CHASE MANHATTAN BANK,
:
Defendant.
----------X
: DECISION
BANCO PARA EL COMERCIO
EXTERIOR DE CUBA, :
Plaintiff, :
61 Civ. 0410-CLB
:
-against-
:
FIRST NATIONAL CITY BANK,
:
Defendant.
----------X

Brieant, J.

The first of these actions was filed November 28, 1960 by Banco Nacional de Cuba (hereinafter "Banco Nacional") against Chase Manhattan Bank (hereinafter "Chase"). The second above entitled action was filed February 1, 1961 by Banco Para el Comercio Exterior de Cuba (hereinafter "Bancec") against First National City Bank (hereinafter "Citibank"). Both cases arise out of events following and connected with the recent Cuban Revolution and the

consequent change in the economic, social and political structure of the Republic of Cuba.

These cases are two out of a larger number of similar cases pending in this Court. By separate orders made on August 7, 1961 by Hon. Sylvester J. Ryan, then Chief Judge of this Court, each of these cases were assigned for all purposes to Hon. Frederick van Pelt Bryan, pursuant to Rule 2 of the Civil Rules of this Court as then in effect. The cases were tried before Judge Bryan, who thereafter departed this life on April 17, 1978.

Following the death of Judge Bryan, these cases were reassigned to me, and the parties have stipulated and agreed through their counsel that the issues may be resolved by the Court based upon all the proceedings and papers before the late Judge Bryan, without the necessity of reopening the trial record, taking additional proof or observing the demeanor of any witnesses.

The Court has subject matter jurisdiction of the respective complaints under 28 U.S.C. § 1332(a)(2). The counterclaims pleaded in each case are conceded to be recoverable only as set-offs to the extent that a plaintiff prevails on its respective complaint.

Although these cases have not been consolidated, they present related issues of fact and law, and the post-trial hearings before me were conducted jointly. Accordingly, and to avoid repetition it

seems appropriate that the issues presented be determined in a single decision.

Familiarity is assumed with the stipulated and conceded facts in these cases, which will not be recited except to the extent necessary for an understanding of the issues presented. Familiarity is also assumed with the prior litigation tried before the late Judge Bryan, Banco Nacional de Cuba v. First National City Bank, 270 F.Supp. 1004 (S.D.N.Y. 1967), rev'd 442 F.2d 530 (2d Cir. 1971), rev'd 406 U.S. 759, reh. denied 409 U.S. 897 (1972); on remand 478 F.2d 191 (2d Cir. 1973) (hereinafter "Banco I"). Plaintiffs have reserved their right to relitigate on subsequent appeal the legal points determined in the Banco I case, but their counsel concedes that for purposes of proceedings in this district court, those issues are precluded by the plurality opinions of the Supreme Court in 406 U.S. 759, et seq. and the determination on remand in 478 F.2d 191. For additional discussion of these issues, see Banco Nacional de Cuba v. Sabbatino, 193 F.Supp. 375 (S.D.N.Y. 1961), aff'd 307 F.2d 845 (2d Cir. 1962), rev'd 376 U.S. 398 (1964); on remand, sub nom. Banco Nacional de Cuba v. Farr, 243 F.Supp. 957 and 272 F.Supp. 836 (S.D.N.Y. 1965), aff'd 383 F.2d 166 (2d Cir. 1967), cert. denied 390 U.S. 956, reh. denied 390 U.S. 1037 (1968), and also the legislative history leading to the enactment of the so-called "Hickenlooper" or "Sabbatino" Amendment, now 22 U.S.C. § 2370(e)(2), passed by Congress to frustrate in part the apparent or perceived rule of the Supreme Court in the Sabbatino case.

II

Background

There is much literature concerning the events in Cuba following the overthrow of the Batista Government. Much of this literature is partisan in nature and of no assistance in setting forth the background of events described below. Sufficient it is to state that the effective date of the revolution in Cuba, which began in the Sierra Maestra Mountains in December 1956, is generally agreed to have been January 1, 1959.

Almost immediately after the overthrow of the Batista administration, a national government was established by Castro, Che Guevera and others, which concentrated under one hand all the executive and legislative functions of the Cuban Government. The Castro Government regarded itself as a lawful continuum of the pre-existing government of the Republic of Cuba and built for the most part on pre-existing law and institutions, making substantial but piecemeal changes to effect its revolutionary goals. Following the assumption of power it began a swift sequence of social changes in Cuba's internal affairs, and in its relationships with foreign powers and the aliens then resident in Cuba.

Almost immediately, new currency control regulations were imposed, and those regulations were gradually tightened. Banco Nacional was restructured internally in the fashion described below, and it became the sole official licensor of all foreign payments and any remissions of

profits earned in Cuba by alien owned enterprises. From time to time, amendments to these regulations and changes in the policy under which they were administered, contrived to place continuously greater limitations on international trade with Cuba. Also limited thereby was the transaction of domestic business in Cuba, including banking, and the enjoyment of property, by foreigners.

Following the Revolution, many members of the propertied and professional classes in Cuba took refuge in foreign countries; they fled the realm. Cuba began a swift and purposeful transition from an economy in which most of the means of production were owned and controlled by private individuals and firms, both native and alien, to a nation where the economy was more closely controlled by Government, and where the Government directly or indirectly assumed ownership and operation of the means of production. This new Government has been described loosely in the briefs as a "socialist" Government. At least within the classical definition of these words, it was not. In socialism, we are taught that the workers own and control the means of production. In Cuba, after the Revolution, the Cuban Government owned and controlled the means of production, to a gradually increasing extent. The resulting internal organization may best be described as "state capitalism."

By various statutes and decrees, ownership and control of the properties and businesses of those who fled Cuba following the Revolution became vested in the Cuban Government. On May 17, 1959 an "agrarian reform law" was enacted, looking towards nationalization and dismemberment of large land holdings in a nation which had

previously founded its economy largely on the production of sugar for export. This agrarian reform was administered by an arm of the Cuban Government known as INRA (El Institutio Nacional de Reforma Agraria), which proceeded to act in the nature of a state-owned trading corporation, owning the sugar production facilities and disposing of the export sugar crop. Persons or entities called "interventors" were appointed by the Cuban Government to confiscate and conduct numerous business enterprises owned by absentees, native and foreign.

In November 1959, Banco Nacional de Cuba, the central bank of the Republic of Cuba, was reorganized, and Che Guevera was appointed President of Banco Nacional.

These significant social changes, hereinafter referred to in totality and for simplicity as "the social changes" were accompanied by the usual rhetoric, and by promises, viewed and intended to be viewed by some as threats, that more of the same was to follow shortly. And it did.

Sugar in the world market had been a surplus commodity for many years. Cuban sugar producers had been granted an import quota, politically administered and changed annually, for sugar to be licensed by the United States Government for importation into the American market. In the United States, the price of sugar has traditionally been maintained at a level above the world competitive price, and close to the marginal costs of American beet and cane sugar producers, in order to insure survival of domestic producers. The administration and allotment of the sugar import quotas had been an essential part of

American foreign policy for many years in dealing not only with Cuba, but with other sugar producing nations. Adjustments in the sugar quota were treated as diplomatic rewards and punishments for foreign nations producing sugar, based upon their international conduct, their perceived friendliness, and treatment accorded to American nationals.

As a result of rapidly deteriorating foreign relations between the new Cuban Government and the United States, and the abhorrence which nature has for a vacuum, even in diplomacy, the Soviet Union, on February 13, 1960, was able to enter into a barter-type commercial agreement with Cuba by which large quantities of Cuban sugar were permitted to enter Russia and Russian-dominated trading partners where that sugar had not previously been sold. That sugar was to be paid for in merchandise, including, but not limited, to armaments produced in the Soviet Union. The United States reacted to this perceived disloyalty or threat to its security by in effect abolishing Cuba's share of the sugar quota, and preventing entry of Cuban sugar into the United States market. See 74 Stat. 330 (1960), which became a law on July 6, 1960.

On July 6, 1960, as an immediate response to the enactment of the aforementioned statute repealing the Cuban sugar quota, the Cuban Government enacted Law No. 851 providing for the nationalization of the businesses and properties located in Cuba of United States citizens. On August 6, 1960, twenty-six United States owned corporations, branches or businesses were nationalized.

Interventors were appointed to run each of these businesses for the Cuban Government, and no compensation was made, then or since, to the American owners. On September 16, 1960, United States banking operations in Cuba operated by Chase, Citibank and others were confiscated in the fashion set forth below in greater detail.

Diplomatic relations between the two countries came to an end; transfer of funds between the United States and Cuba was interdicted in both countries. So it remains today.

III

Organization of Banco Nacional

Banco Nacional was organized by Law No. 13 of December 23, 1948, effective December 30, 1948. Prior to the revolution it was the central bank of Cuba. It had all of the powers of a local commercial bank within the Republic of Cuba, and was engaged in national and international banking. It also exercised the administrative and fiscal powers of government over private banking, much to the same extent that the Federal Reserve System does in the United States, or as the Bank of England or any other central bank, is accustomed to doing in the countries allowing private internal or international trade and banking.

One-half of the stock of Banco Nacional had been subscribed for and issued to the Government of the Republic of

Cuba. Prior to the Cuban Revolution of 1959, the remaining half had been issued to subscribing private banks, which were required to participate. Its president and three out of five directors were appointed by the Republic. The Government shared in the profits of the Bank after the payment of dividends to its shareholders and appropriations to reserves. Banco Nacional had the sole power to issue currency in the Republic of Cuba, such currency being regarded as an obligation of the Cuban state. It set maximum interest rates for private banks, acted as fiscal agent and economic advisor to the Government, and as agent for the Currency Stabilization Fund created simultaneously and by the same Law No. 13 of 1948.

Prior to the Revolution, Banco Nacional had acted as the representative of the Cuban Government in the International Monetary Fund and the International Bank of Reconstruction and Development. It was exempted from taxation, was the sole designated depositary of state funds, had the power to make loans to the Currency Stabilization Fund and possessed detailed powers and corporate purposes to assist the Currency Stabilization Fund in the exercise of the latter's duty to protect the national currency in international trade. Under Cuban law Banco Nacional had the power to sue and could be sued, and had a specifically authorized capital. Under domestic law it was not liable for any of the duties or obligations of the Cuban Government or any other agency, and its liability was limited to its own capital and assets. That is to say, the Government was not responsible for its debts.

Banco Nacional was given the power to regulate the operations of existing commercial banks and "any other natural or artificial person" habitually engaged in banking. Banks already established prior to 1948 were required to register with Banco Nacional, and upon doing so could continue their business, subject to the regulation of Banco Nacional.

After the Revolution, and particularly by Resolution No. 2 of Law No. 851, dated September 17, 1960, and by Law No. 891 of October 13, 1960, discussed below, Banco Nacional assumed a number of additional governmental functions. There was a studied effort to preserve a continued corporate existence, while reorganizing the central bank to conform it to the new order. Banco Nacional became thereby wholly owned by the Cuban Government as sole shareholder, with all assets and profits vested in or accruing to the Treasury of the Cuban Government. Banco Nacional can be regarded as an essential element or arm of the present Cuban Government, at least at all times on and after September 17, 1960, and perhaps earlier as a result of de facto assumption of absolute control. This status of Banco Nacional as an alter ego of the Republic of Cuba has been confirmed and adjudicated before. Banco I, 478 F.2d 191, 193 (2d Cir. 1973).

As a foundation on which further legislation could be based, the Cuban Revolutionary Government enacted the "Fundamental Law," effective February 7, 1959. Article 24 of this Fundamental Law regulated confiscation of property by the

State. In principle, it barred any deprivation of property except by "competent judicial authority, for justified reasons, ... and always upon due payment of adequate indemnity." However, Article 24 contained an exception to this general rule, which was relied on as authority for the numerous expropriations that were to come. This exception authorized the confiscation of property held by the "Tyrant" [Batista, the prior dictator] and any of his collaborators "responsible for the crimes committed against the national economy ... or who have enriched themselves illicitly."

Pursuant to Article 24's provision for the expropriation of property, Law No. 851 was enacted on July 6, 1960. This conferred full authority upon the President and the Prime Minister of the new government to nationalize, through forced expropriation, property held by United States nationals. The President and the Prime Minister were given the power to appoint persons or agencies necessary to administer the nationalized properties, and the appraisers to determine the value of the properties. Law No. 851 provided for payment to be made, based on the appraised value, for the property expropriated.

Law No. 851 was executed through resolutions, only one of which is relevant here. Resolution No. 2, signed by President Torrado and Prime Minister Castro on September 17, 1960, ordered that all the property of Chase, Citibank and The First National Bank of Boston be nationalized through forced expropriation, and that the

President of Banco Nacional administer the assets and the banking businesses of these firms. Further, the resolution declared that the member of the Board of Directors of Banco Nacional who was appointed by the "foreign" banks pursuant to Law No. 13, Article 23 (enacted December 23, 1948) would cease to represent the nationalized banks while on the Board. In accordance with this resolution, the branch banks and the assets in Cuba of Citibank, Chase and The First National Bank of Boston were expropriated.

Law No. 851 and the accompanying Resolution No. 2 were both promulgated for the stated purposes of defense of the national sovereignty and protection of the economic development process of Cuba, and to remove a perceived imperialist threat on the part of the banks. The next step in further nationalization of property was the adoption of Law No. 890 and Law No. 891, which were enacted together on October 13, 1960.

Law No. 890 nationalized the "large industrial and business enterprises [other than banks, but including railroads] which [had] not yet adapted ... to the revolutionary reality."

IV

Nationalization

Law No. 891 of October 13, 1960 was entitled the "Bank Nationalization Law." Its preamble noted that the monetary and credit policy forms part of the general economic

policy of the Government and performs a fundamental strategic function in the assignment and orientation of the productive resources of the country; that it was essential to change the old banking structure of the nation, and adjust to the new conditions of economic development created as a consequence of the revolutionary process, and that the creation of currency and extension of credit should be public functions, vested exclusively in the State in accord with the requirements of economic planning, and should not be in the hands of private concerns, which operate under the urge of profit and with greater consideration to individual than to collective interests. The preamble adjudged that it was necessary, to achieve the foregoing objectives, to nationalize and expropriate in favor of the State all the national private banking concerns that operate in the nation as a step precedent to the definitive structure of the national banking system.

Law No. 891 by Article I declared the banking function public, to be carried only by the State, through the organs created for that purpose. By Article III of that Law it was ordered that the nationalization and subsequent adjudication to the Cuban State ordered in the preceding Article be effected through Banco Nacional de Cuba as the autonomous body charged with moving the banking function of the State. Banco Nacional was declared to be the legal successor, subrogated in the place and stead of a natural or juridical person engaged as a banker, and it was legislated that upon

the "consequent taking over of Banco Nacional de Cuba of the assets and liabilities of the juridical persons or companies affected by this law" they were declared dissolved and extinguished. Article V of the Law provided that the partners or stockholders of the juridical persons or companies dissolved or extinguished were entitled to the right of indemnity resulting from the appropriations ordered, and that payment will be made by liquidating the corporate credits or shares as well as the dividends or profits earned up to the effective date of this Law "according to the system of appraisal selected by the President of the Bank" (Banco Nacional de Cuba) at the close of operations December 31, 1960. Additional provisions are set forth requiring the issuance of bonds for part of the amounts due. The statute provided that Banco Nacional "shall assume liability for the deposits existing in the banks" affected by the Law, and shall "guarantee the owners thereof as to the normal handling of the operations related thereto."

The Board of Directors and the assembly of stockholders of Banco Nacional were "dissolved" and their functions assumed by the President of the Bank under the advice of a Consultative Council of the highest ranking officials of other specialized banks. The Currency Stabilization Fund, established June 10, 1939 was dissolved and reorganized. By Article XVI, two Canadian banks, Royal Bank of Canada and Bank of Nova Scotia, were exempted from nationalization. These were acquired later.

Law No. 930, adopted February 23, 1961, further reorganized Banco Nacional de Cuba. It purported to continue the independent juridical status and patrimony of the Bank, but also provided that it should exercise the monetary sovereignty of the nation, the monopoly of the power to issue currency.

V

The Claims and Counterclaims

Banco Nacional as plaintiff asserts its claim against Chase in its capacity as successor in interest of other Cuban banking institutions owned by the Cuban Government. On August 19, 1958 Chase had loaned $30,000,000, later reduced by partial payments, to Banco de Desarollo Economeco y Social (hereinafter "Bandes") and Fonda de Establizascion de la Moneda (hereinafter "Fonda"). The loan was secured by United States obligations. On February 17, 1960, Bandes and Fonda were each dissolved by Law No. 730, enacted on that date, and by statute, Banco Nacional succeeded to their assets and liabilities. On August 17, 1960, a further payment of $5,000,000 was made to Chase by Banco Nacional on account of the Bandes loan, which reduced the amount owed to $10,000,000, the amount due at the time of the nationalization of Chase's Cuban banking branches. Additionally, Banco Nacional then had on deposit with Chase at its home office, $2,500,000, together with $37,622 accrued interest.

On or about September 19, 1960, after learning of the confiscation of its Cuban branches, Chase sold the remaining collateral which it then held for the Bandes loan for an amount in excess of $17,000,000. After applying the amount so realized to the payment of the outstanding principal and interest on the Bandes loan, Chase was left with a surplus of $7,256,398. Chase was thus indebted to Banco Nacional in that sum, plus the amount

of Banco Nacional's deposit with accrued interest, making a total of $9,794,020. Chase does not dispute that it was indebted to Banco Nacional in that amount. It concedes liability on the complaint, and asserts the four separate counterclaims or set-offs discussed below.

VI

Bancec's Status

Plaintiff in the second above entitled action, Banco Para el Comercio Exterior de Cuba, referred to by the parties for convenience as "Bancec," was a Cuban bank established by Law No. 793 of May 4, 1960. As can be seen below, it too is properly regarded as an alter ego of the Cuban Government to the same extent that Banco Nacional has been so found to be, and for substantially the same reasons.

For an understanding of the relevant corporate history of Bancec, we must digress slightly, to describe the claim asserted here in its behalf.

As a result of the Agrarian Reform Act of May 17, 1959, INRA had become the owner of a cargo of animal feed sugar sold by Bancec pursuant to contract for delivery into the United States. The contract was supported by an irrevocable letter of credit in the favor of Bancec, issued in New York on August 18, 1960 by Citibank in the amount of $650,000 U. S. funds payable at sight on readiness to discharge in a U.S. port. On that date, Citibank was

operating its branches in Cuba. The "intervention" of its branches and those of Chase, discussed herein, did not take place until September 17, 1960.

On September 15, 1960 Citibank received from Banco Nacional for collection, a sight draft and supporting documents authorizing payment of $193,280.30 for a portion of the sugar actually delivered and discharged at Pascagoula, Mississippi. On September 20, 1960, following intervention, Citibank "paid" the draft to the account of Banco Nacional and purported to set-off the proceeds against the value of its Cuban branches, then in possession of Banco Nacional.

By Law No. 930, dated February 23, 1961, Bancec was dissolved, and Banco Nacional succeeded to all the assets, rights and claims of Bancec "peculiar to the banking business." No disposition of any other assets or claims of Bancec was made in Law No. 930.

At the time of the enactment of Law No. 930, the claim sued upon herein had the status of a draft upon an irrevocable letter of credit. Such a res or chose in action is regarded as being the sort of asset, right and claim peculiar to the banking business, and accordingly, probably should be regarded as vested in Banco Nacional as of February 23, 1961. In any event, Banco Nacional had previously made claim on Citibank as the collecting agent.

Thereafter, by Law No. 934, promulgated on the same day, the assets and claims of Bancec not peculiar to the banking business were vested in the Ministry of Foreign Trade of the Government of Cuba. This governmental body was authorized to establish entities, in the nature of state trading corporations, under its supervision to conduct foreign trade. This law provided that the Ministry was not to be liable for any obligations these enterprises might undertake. The Ministry of Foreign Trade, by Resolution No. 1, dated March 1, 1961, created Empresa Cubana de Exportaciones (Cuban Enterprise for Exports), which was empowered to conduct all commercial export operations of the nation formerly conducted by Bancec--"remaining subrogated in the rights and obligations of said bank (Bancec) as regards the commercial export activities." This particular assignment or delegation must be regarded as irrelevant because the sugar, which is the subject of this lawsuit, had already been delivered, and at the time of the Resolution, had become transformed into a debt.

Thereafter, by Resolution No. 102, issued by the Ministry of Foreign Trade on December 29, 1961, Empresa Cubana de Exportaciones was dissolved as of December 1, 1981. On January 1, 1962, the same Ministry issued Resolution No. 1 of that year, creating Empresa Cubana Exportadora de Azucar y sus Derivados, referred to at trial and hereinafter as "Cuba Zucar." It succeeded to the rights and obligations of Bancec relating to

foreign commerce in sugar and its derivatives.

By motion docketed in this litigation on May 2, 1975, plaintiff moved for an order pursuant to Rule 25, F.R.Civ.P., substituting Empresa Cubana Exportadora de Azucar y sus Derivados (Cuba Zucar) as the plaintiff herein. In opposition to that motion defendant argued that despite the provisions of the various laws and resolutions having to do with the devolution of the claim, which Citibank regarded as self-serving, the subsequent agencies could not be insulated from the counter-claims of defendant against the Cuban Government, and that none of the subsequent agencies could take any more or obtain any better title than its predecessors, the Ministry of Foreign Trade of the Republic of Cuba, or Bancec. As background for the May 2, 1975 motion, the parties had previously stipulated that the Republic of Cuba itself should be substituted as a plaintiff, and should serve an amended complaint. A stipulation to that effect was marked "SO ORDERED" on July 6, 1961. This stipulation, docketed July 7, 1961, authorized the "supplemental complaint in the form annexed," but no such supplemental complaint was apparently annexed or submitted to the Court. No such amended complaint was ever served and filed, and no formal substitution of the Republic of Cuba took place.

By a memorandum decision docketed August 4, 1975, Judge Bryan denied the motion to substitute Cuba Zucar, pointing

out that substitution of parties under Rule 25(c), F.R.Civ.P. lies "in the sound discretion of the court."

VII

Real Party in Interest

These occurrences naturally inject a question of "real party in interest" into the discussion of Bancec's claim. The Court perceives no significance or validity to any arguments based on that concept. Bancec and its successors in interest are to be equated with the Cuban Government. Bancec was created by the Government to engage in a state function. All of its capital was contributed by the Government, and it had no function to fulfill, except to manage the export of commodities for the account of the Government. Thereafter, the devolution of the claim, however viewed, brings it into the hands of the Ministry, or Banco Nacional, each an alter ego of the Cuban Government. For our purposes we accept the present contention of plaintiff's counsel that the order of this Court of July 6th permitting, but apparently not requiring, the service of an amended complaint in which the Republic of Cuba itself would appear as a party plaintiff in lieu of Bancec was based on counsel's erroneous assumption, or an erroneous interpretation of the laws and resolutions providing for the devolution of the assets of Bancec. Assuming this to be true, it is of no moment. The Ministry of Foreign Trade is no different than the Government of which its minister is a member.

Citibank also argues as an alternate theory, that Banco Nacional is the real party in interest here because the draft against the letter of credit was deposited with Banco Nacional as an agent for collection [¶7 of Court's Ex. 1, Stipulation). Banco Nacional made demand on Citibank in New York for payment in dollars and under prevailing local banking practice, would be required to and would, account in Havana to Bancec for the proceeds in Cuban pesos. Citibank argues therefrom in effect, that it honored the draft in favor of Banco Nacional, and instead of remitting the funds to Banco Nacional, set-off its claims against Banco Nacional against the funds which it had become obligated to pay, not Bancec, but Banco Nacional. This analysis, if accepted, would place Bancec in the status of a beneficiary of a promise by Citibank to pay Banco Nacional, and thereby subject it to the defenses and set-offs existing in favor of Citibank against Banco Nacional.

The Court rejects as invalid this alternate theory of set-off as between banks. The relationships here are regulated by §§350-a, et seq. of the New York Negotiable Instruments Law, since repealed effective September 27, 1964, as to transactions occurring after that date, upon adoption of the Uniform Commercial Code. That section provided in relevant part:

> §350-a. Bank as agent for collection.
>
> Except as otherwise provided by agreement and except as to subsequent holders of a negotiable

> instrument payable to bearer or indorsed specially or in blank, where an item is deposited or received for collection, the bank of deposit shall be agent of the depositor for its collection and each subsequent collecting bank shall be sub-agent of the depositor but shall be authorized to follow the instructions of its immediate forwarding bank and any credit given by any such agent or sub-agent bank therefor shall be revocable until such time as the proceeds are received in actual money or an unconditional credit given on the books of another bank, which such agent has requested or accepted. Where any such bank allows any revocable credit for an item to be withdrawn, such agency relation shall nevertheless continue except the banks shall have all the rights of an owner thereof against prior and subsequent parties to the extent of the amount withdrawn." [Emphasis added]

This section, adopted in 1929, was declaratory of prior New York law, at least as to the point under consideration. McBride v. The Farmers Bank of Salem, Ohio, 26 N.Y. 450, 454 (1863) and prior New York cases cited therein, reached this result on reasoning that the collecting bank was not a bona fide holder in due course for value, because antecedent debt is not such a

consideration. On this actual point hung the dispute between New York State courts and the Supreme Court following the decision in Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) overruled in Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Compare, The Bank of the Metropolis v. The New England Bank, 42 U.S. (1 How.) 234 (1843) permitting set-off by a collecting bank as sought herein. In a pre-Erie case, Carnegie Trust Co. v. First Nat. Bank of the City of New York, 213 N.Y. 301, 304 (1915) the New York Court of Appeals (per Cardozo, J.) assumed, but found it unnecessary to hold, that a collecting bank had the right before it made remittance to apply the collections against its deposit with the plaintiff bank of deposit. The Court suggested that the issue would turn on "the relation between the [collecting] bank and the plaintiff," which it characterized as "obscure." The Court noted that if the bank held the drafts for collection only, as trustee or agent for the depositor, "the rules of equitable set-off do not permit a trustee or agent to apply a claim in his own right in cancellation of his liability as a fiduciary," citing Morris v. Windsor Trust Co., 213 N.Y. 27 (1914).

Thereafter, in Dakin v. Bayly, 290 U.S. 143 (1933), the Supreme Court, in a case involving a Florida statutory scheme similar to §§350, et seq. of the New York NIL, distinguished Bank of the Metropolis, supra, and held that in light of the agency relationship existing between the depositor and forwarding bank, no set-off could be

permitted in favor of the collecting bank for lack of mutuality. The Supreme Court held (p. 146 of 290 U.S.) "a defendant sued upon his individual debt may not avail himself for this purpose of a demand against the plaintiff held in a fiduciary capacity." (Citations omitted.)

To the same effect is the holding in Friedman v. Irving Trust Co., 164 Misc. 811, 300 N.Y.S. 51 (Mun. Ct. N.Y.C. 1937) applying New York law. There, the Court held:

> "The Huguenot Bank [depositary bank] acted only as plaintiff's collecting agent; the defendant, as subagent. The credit given by defendant to the Huguenot Bank was given after the suspension of the Huguenot Bank .... While the defendant claims it paid the proceeds of these checks to the Huguenot Bank, the actual fact is that the so-called 'payment' was nothing more than a mere accounting item on its books after the suspension of the depositing bank; this so-called 'payment' was neither a payment in currency nor an 'unconditional credit' of a character recognized in law (see sections 350-a, and 350-1, Negotiable Instruments Law) and, if anything, it would appear that what the defendant did do, in effect, was to reduce on its own books an indebtedness due to it from the Huguenot Bank.

* * *

> "By the express terms of section 350-a of the Negotiable Instruments Law, defendant was the subagent of the plaintiff; the funds in question, upon collection by the defendant, were a trust fund for the benefit of the plaintiff."

Within §350-a of the New York NIL, Bancec has never received the proceeds of the sight draft in "actual money." There is no showing that it ever received an "unconditional credit." In In re Bank of United States, 243 App.Div. 287 (1st Dept. 1935) it was held that:

> "The term 'unconditional credit,' although frequently recurring, is nowhere defined throughout article 19-A of the Negotiable Instruments Law (section 350, et seq.). That article, commonly known as the Bank Collection Code, in many respects has revolutionized the ancient principles pertaining to the collection of commercial paper by banks. ... Construing together all the provisions of that article, the term 'unconditional credit' can only mean a credit which may not be withdrawn, even if it is eventually found that the item for which it is given is not collectible. It imports a credit which is not 'revocable' under section 350-a, nor 'provisional' under section 350-b."

Recently in Fuller v. Fasig-Tipton Co., 587 F.2d 103, 106 (2d Cir. 1978), the Court of Appeals held that "one dealing with an agent for a disclosed principal may not set-off the agent's personal indebtedness against amounts due the principal." The stipulated facts, while showing that the draft was deposited by Banco Nacional for collection, does not state whether the agency relationship was known to Citibank. Probably such knowledge can be inferred from all the facts, but if not, Citibank was aware of the statutory presumption and had no factual knowledge indicating otherwise. Accordingly, Citibank here cannot discharge its obligation to Bancec by setting-off against Bancec the indebtedness to it of Banco Nacional as collecting or depositary bank with respect to the sight draft which is the subject of plaintiff's claim.

Rather, the Court will look to the realities of the situation, which justify regarding Bancec and its successors in interest the same as Banco Nacional or the Cuban Government for these purposes, in accordance with the rule of Banco I, Sabbatino and Farr, discussed supra, pp. 2-3.

No factual or legal basis is perceived to distinguish between the one Government wholly owned bank, Banco Nacional on the one hand, and the other Government wholly owned bank, Bancec, on the other hand. The law creating Bancec describes it as "an official, autonomous, credit institution for foreign trade with

full juridical capacity and capital of its own." This view of Bancec is not controlling on the Court. Under all of the relevant circumstances shown in this record, including the Stipulated Facts, it is clear that Bancec lacked an independent existence, and was a mere arm of the Cuban Government, performing a purely governmental function. The control of Bancec was exclusively in the hands of the Government, and Bancec was established solely to further Governmental purposes. Moreover, Bancec was totally dependent on the Government for financing and required to remit all of its profits to the Government.

While analogy to American institutions is of slight value, Bancec's complete financial dependence on the Cuban Government distinguished its situation from that of the Tennessee Valley Authority ("TVA"), regarded by plaintiff as being analogous to itself. The TVA has far greater financial independence, including the authority to issue bonds to finance its projects, subject only to prior approval of the Secretary of the Treasury, and less direct government control of its management, 16 U.S.C. §§831(n)(1)-(n)(4). Bancec, in its relationship to the Government, seems closer to the now defunct Reconstruction Finance Corporation ("RFC") and its subsidiaries, which on numerous occasions were held to be an agent or arm of the United States Government, and shared in the privileges, responsibilities and immunities of that Government. See, e.g., Keifer & Keifer v. RFC, 306 U.S. 381 (1939). Of course cases involving American

governmental agencies are of slight value as precedent here; at most they support an a fortiori argument.

Also of slight weight are reported cases in American courts decided before January 21, 1977 involving agencies and instrumentalities of foreign countries, most of which have been resolved factually according to the degree of independence of the corporate entity. United States v. Deutsches Kalisyndikak Gesellschaft, 31 F.2d 199 (S.D.N.Y. 1929); Coale v. Societe Co-Operative Suisse Des Charbons, Basle, 21 F.2d 181 (S.D.N.Y. 1921); Ulen & Co. v. Bank Gospodarstwa Krajowego 261 App.Div. 1, 24 N.Y.S.2d 201 (1940). Also inapposite are cases in which private corporations were continued to be treated as such, notwithstanding acquisition by government of stock ownership of those corporations. See, e.g., Bank of the United States v. Planters' Bank of Georgia, 9 Wheat. 904 (1824); Ballaine v. Alaska Northern Ry. Co., 259 F. 183 (9th Cir. 1919); Panama R. Co. v. Curran, 256 F. 768 (5th Cir. 1919).

Cases decided under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-11, e.g.,Yessenin-Volpin v. Novosti Press Agency, 443 F.Supp. 849 (S.D.N.Y. 1978); Edlow International Co. v. Nuklerna Elektrarna Krsko, 441 F.Supp. 827 (D. D.C. 1977), provide support for our conclusion that Bancec is an instrumentality of the Cuban Government for purposes of this case. Bancec is not a mere private corporation, the stock of which is owned by the Cuban Government, but an agency of the

Cuban Government in the conduct of the sort of matters which even in a country characterized by private capitalism, tend to be supervised and managed by Government. Where the equities are so strong in favor of the counter-claiming defendants, as they are in this case, the Court should recognize the practicalities of the transactions. Doing justice in the case should not be obfuscated or side-tracked by self-serving recitals in post-revolutionary statutes of the Cuban Government, undoubtedly drawn with litigation of this sort in mind. The Court concludes that Bancec is an alter ego of the Cuban Government.

Chase admits that it is indebted to Banco Nacional in the amount of $9,793,021.70, except to the extent that it is entitled to assert set-offs, in reduction of that amount. Citibank concedes and admits that it is indebted either to the Cuban Government, Bancec, the Ministry of Foreign Trade, Banco Nacional, Empresa Cubana de Exportaciones, or Cuba Zucar in the amount of $193,280.30, as a result of an accepted draft against its letter of credit to Bancec referred to above. This concession also is subject to the right of set-off.

There is also at issue whether these claims are entitled to accrue pre-judgment interest, and that question also applies to the counterclaims. The matter of interest is discussed infra, p.73.

VIII

Legal Basis for the Counterclaims

The set-offs pleaded here arise generally out of the nationalization of the branch banks of Chase and Citibank in Cuba. On September 16, 1960, Citibank maintained eleven branch offices in Cuba, and Chase had four such branches. The organization and nature of the branches is described in greater detail below. Citibank had been engaged continuously in branch banking in Cuba since 1915 and Chase had been so engaged since 1925.

The first of Chase's claims arises out of the claimed confiscation on September 17, 1960 of its Cuban branches, said to be in violation of international law. Chase asserts that the Cuban Government was liable to it for the value of such property; and that the Government of Cuba and Banco Nacional as its wholly owned financial instrumentality are indistinguishable entities for purposes of the liability for the seized property. In addition, Banco Nacional took over, assumed control of and enjoyed all of the benefits of the assets and banking branches of Chase in Cuba, giving rise to an alternate theory based on implied contract.

Chase exercised a set-off for what it claims to be the value of the property of its Cuban branches, including goodwill and going business value so confiscated. It so advised Banco Nacional.

At about the same time, Chase was also acting as trustee for American investors owning leased railroad equipment in possession of two Cuban railroads under what are conceded to have been financing leases. The Cuban Government expropriated the railroads and their rolling stock on October 13, 1960, pursuant to Law No. 890, and has repudiated the obligations of the railroads to Chase as trustee for the equipment trust certificate owners. The resulting damages are claimed to be $4,073,497.00, also asserted here as a set-off.

With respect to all of their claims, Chase and Citibank each recognize that they cannot proceed affirmatively against plaintiffs in this action, or the Government of Cuba, but are at most entitled to a full set-off. See National City Bank v. Republic of China, 348 U.S. 356 (1955); 28 U.S.C. §1607(c).

Chase has pleaded the claims arising out of the loss of its Cuban banking branches separately on alternative theories of liability, and has also asserted separately its counterclaims arising out of the railroad equipment.

Banco Nacional has defended in accordance with what may be characterized as at least five separate theories. These are: (1) Banco Nacional is a separate entity from the Government of Cuba and not liable for the obligations of the Cuban Government for the value of American property in Cuba which was confiscated; (2)

Even if the Cuban Government and Banco Nacional are indistinguishable entities, Chase's claims arising out of the expropriation of the Cuban branches and credits located in Cuba are not actionable here by reason of the doctrine of sovereign immunity; (3) The claims against the Government of Cuba insofar as they concern assets and credits specifically located in Cuba are barred by the Act of State doctrine; (4) The expropriation or nationalization of Chase's Cuban branches and the seizure of the leased railroad equipment by the Cuban Government were not violations of international law, and did not give rise to a claim against the Cuban Government by Chase for the value of such property; and (5) The claims of Chase in its capacity as trustee for the value of the confiscated railroad property, to which Chase held title as trustee for others, cannot be asserted as a counterclaim or set-off in this lawsuit because they violate the "opposing party doctrine" developed in cases construing Rule 13(b), F.R.Civ.P.

Insofar as the Chase branch banks are concerned, the liability theory asserted by Chase in this litigation has already been validated in the companion Citibank litigation. See, Banco I, 270 F.Supp. 1004, 1006, 1010 (S.D.N.Y. 1967), on remand, 478 F.2d 191, 193-94 (2d Cir. 1973). See also, National City Bank v. Republic of China, 348 U.S. 356 (1955). For the reasons stated in Banco I, Chase can set-off the full value of its branches and their assets in this lawsuit, and

little purpose will be served in a further or additional analysis of the law concerning that liability. The Court recognizes that plaintiffs, which have briefed the issue comprehensively, seek to relitigate the correctness of Banco I, and they in turn recognize that this Court at trial level is precluded by the prior appellate pronouncements affirming in substantial part the decision of Judge Bryan in Banco I.

Basically that litigation stands for the purpose that Banco Nacional and the Government of Cuba are and were one and the same for all purposes of the litigation of this type of claim; and that in a suit by a foreign sovereign in our courts, the sovereign immunity doctrine does not bar a set-off up to the amount recovered by the foreign sovereign (see National City Bank v. Republic of China, supra, and cases cited in Banco I, 270 F.Supp. at 1006, 1007. Also, Banco I stands for the point that a claim of set-off is not barred under the circumstances of this case by the Act of State doctrine as enunciated in Banco Nacional v. Sabbatino, 376 U.S. 398 (1964), because the set-off is authorized by the so-called Hickenlooper or Sabbatino Amendment to the Foreign Assistance Act of 1964, 22 U.S.C. § 2370(a)(2), as amended, 79 Stat. 658-59.

It is also a foreclosed issue that the taking of Citibank's Cuban branches by the Government of Cuba was in violation of international law because (a) Cuba failed to provide compensation for the taking; (b) the taking was a retaliatory measure

against the United States citizens because of their Government's actions with respect to the Cuban sugar quota; and (c) the taking discriminated against American nationals in that Cuban owned, as well as Canadian and French private banks were not acquired by the Cuban State until much later.

In connection with our discussion of Act of State, it must be observed that Chase and Citibank each have a "Bernstein letter" from the Office of the Secretary of State of the United States. Bernstein v. N.V. Nederlandsche, 210 F.2d 375 (2d Cir. 1954). The 5 - 4 decision of the Supreme Court at 406 U.S. 759 (1972) in Banco I must be read to hold that the Act of State doctrine does not bar consideration of Citibank's off-set up to the amount of Banco Nacional's claim against Citibank. That conclusion applies with equal vigor to Chase's offsets here pleaded.

The plurality opinions in Banco I each found a different factor determinative of the question of when and under what circumstances the courts of this country may examine the legality of expropriations within its boundaries by a foreign government of property of American citizens. At least it may be inferred from Banco I that the Bernstein exception to the Act of State doctrine is regarded by Chief Justice Burger and Justices Rehnquist and White as having continued vitality. In the view of Justice Douglas, a foreign sovereign which brings suit in American

courts waives its defense of sovereign immunity, and pro tanto waives the Act of State doctrine defense, insofar as concerns counterclaims up to the amount of the claim which the foreign sovereign asserts. This view is apparently codified in 28 U.S.C. § 1607(c). The Foreign Sovereign Immunities Act of 1976 was regarded by the court in Yessenin-Volpin v. Novosti Press Agency, 443 F.Supp. 849, 851 (S.D.N.Y. 1978) as retrospective, and applicable to cases undecided on January 21, 1977. The Department of State has expressed the same view. See fn. 1 in Yessenin-Volpin, supra. Banco I suggests Justice Powell believes that the doctrine of the Bernstein letter exception implies a violation of the separation of powers, although he agreed that the Act of State doctrine should not apply to the facts of Banco I.

After deciding only the inapplicability of the Act of State doctrine, or alternatively the effectiveness of the Bernstein letter, the Supreme Court remanded Banco I to the Court of Appeals for the second time "for consideration of [Banco Nacional's] alternative bases of attack on the judgment of the district court." 406 U.S. at 770. Thereafter, the Court of Appeals unanimously affirmed the holding of the district court that Citibank was entitled to set-off, against Banco Nacional's claim, such amount as was due and owing from the Cuban Government as compensation for the seizure of Citibank's Cuban properties which had devolved into the ownership and control of Banco Nacional [478 F.2d 191 (1973)]. The opinion of

Judge Hays in that regard may be held to constitute a holding that Banco Nacional and the Government of Cuba had acted as a single entity in the expropriation of Citibank's Cuban property and were one and the same for purposes of that litigation. It further held that the expropriations of the Citibank Cuban properties by Cuba and Banco Nacional violated international law, citing Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845 (2d Cir. 1962), rev'd on other grounds, 376 U.S. 398 (1964) and Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967), cert. denied 390 U.S. 956 (1968).

There is no reason why the Court should hold otherwise in the case of Chase's branches, and this Court regards these issues as having been conclusively decided. We note in passing that the point of Banco I, that a counterclaim by way of set-off, limited to the amount of a foreign state's principal claim as plaintiff, is not barred by the Act of State doctrine or by sovereign immunity, has been reaffirmed by the majority, concurring and dissenting opinions in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

In sum, it follows from the foregoing that under international law Chase is entitled to compensation for its Cuban branches confiscated. Apart from the stare decisis effect of Banco I available to Chase here, it is to be noted that Professor Lillich in his authoritative work entitled The Valuation of Nationalized Property in International Law (1973), Vol. 2 at p. 121, n. 6, has written:

> "The Cuban nationalizations 'based upon a totally illusory funding systems and payable in bonds that were never printed' so patently violated international law that serious analysis was unnecessary."

As was also observed by the late Judge Bryan in Banco I (270 F.Supp. 1008-10), the acts of the Cuban Government exhibited the same retaliatory, discriminatory character as the measure condemned as violative of international law by the Court of Appeals in Sabbatino, supra, at 845, 865.

Banco Nacional denies that compensation is required by international law, and suggests that the principle of compensation is no longer generally recognized.

As the Supreme Court noted in Sabbatino, 376 U.S. 428, et seq.:

> "There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens. 26/ [26. Compare, e.g., Friedman, Expropriation in International Law 206-211 (1953); Dawson and Weston, 'Prompt, Adequate and Effective': A Universal Standard of Compensation? 30 Fordham L. Rev. 727 (1962), with Note from Secretary of State Hull to Mexican Ambassador, August 22, 1938, V Foreign

Relations of the United States 685 (1938); Doman, Postwar Nationalization of Foreign Property in Europe, 48 Col. L. Rev. 1125, 1127 (1948). We do not, of course, mean to say that there is no international standard in this area; we conclude only that the matter is not meet for adjudication by domestic tribunals.] There is, of course, authority, in international judicial. 27/ [27. See Oscar Chinn Case, P.C.I.J., ser. A/B, No. 63, at 87 (1934); Chorzow Factory Case, P.C.I.J., ser. A., No. 17, at 46, 47 (1928).] and arbitral 28/ [28. See, e.g., Norwegian Shipowners' Case (Norway/United States)(Perm. Ct. Arb.) (1922), 1 U.N. Rep. Int'l Arb. Awards 307, 334, 339 (1948), Hague Court Reports, 2d Series, 39, 69, 74 (1932); Marguerite de Joly de Sabla, American and Panamanian General Claims Arbitration 379, 447, 6 U.N. Rep. Int'l Arb. Awards 358, 366 (1955)] decisions, in the expressions of national governments, 29/[29. See, e.g., Dispatch from Lord Palmerston to British Envoy at Athens, Aug. 7, 1846, 39 British and Foreign State Papers 1849-1850, 431-432. Note from Secretary of State Hull to Mexican Ambassador, July 21, 1938, V Foreign Relations of the United States 674 (1938); Note to the Cuban Government, July 16, 1960, 43 Dept. State Bull. 171 (1960)] and among commentators 30/ [30. See, e.g., McNair, The Seizure of Property and Enterprises in Indonesia, 6 Netherlands Int'l L. Rev. 218,

243-253 (1959); Restatement, Foreign Relations Law of the United States (Proposed Official Draft 1962), §§190-195.] for the view that a taking is improper under international law if it is not for a public purpose, is discriminatory, or is without provision for prompt, adequate, and effective compensation. However, Communist countries, although they have in fact provided a degree of compensation after diplomatic efforts, commonly recognize no obligation on the part of the taking country. 31/ [31. See Doman, supra, note 26, at 1143-1158; Fleming, States, Contracts and Progress, 62-63 (1960); Bystricky, Notes on Certain International Legal Problems Relating to Socialist Nationalisation, in International Assn. of Democratic Lawyers, Proceedings of the Commission on Private International Law, Sixth Congress (1956), 15.1 Certain representatives of the newly independent and underdeveloped countries have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them 32/[32. See Anand, Role of the New Asian-African Countries in the Present International Legal Order, 56 Am. J. Int'l L. 383 (1962); Roy, Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law? 55 Am. J. Int'l L. 863 (1961).] and it is argued that the traditionally articulated standards governing expropriation of property reflect 'imperialist' interests and are

innappropriate to the circumstances of 33/ [33. See 1957 Yb. U. N. Int'l L. Comm'n emergent states. (Vol. 1) 155, 158 (statements of Mr. Padilla Nervo (Mexico) and Mr. Pal (India)).]

The disagreement as to relevant international law standards reflects an even more basic divergence between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favor state control of a considerable portion of the means of production and those that adhere to a free enterprise system. It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations. 34/ [34. There are, of course, areas of international law in which consensus as to standards is greater and which do not represent a battleground for conflicting ideologies. This decision in no way intimates that the courts of this country are broadly foreclosed from considering questions of international law.]"

As a district court, we are not free to overlook or neglect the interpretation of international law reiterated a hundred times over in the American courts simply because some other

nations in public debate and diplomatic correspondence have expressed a different view. While it is true that there is no international law, except to the extent that civilized nations having commercial intercourse with each other, agree that such law exists, and also agree to what it provides, this Court is bound by precedent and must recognize the precedential decisions of higher American courts unless and until withdrawn, set aside or reversed. These cases uniformly have found themselves to be in agreement with Restatement Second, Foreign Relations Law of the United States, §§185, et seq., to the effect that just compensation for a taking of the property of an alien must be made whether the taking in itself is lawful or not, and that such compensation must be adequate in amount, and paid with reasonable promptness.

Plaintiffs present ingenious argument concerning the measure of damages based on recent history. The argument is that, assuming international law requires payment of compensation for expropriated property, at best, all that is necessary is partial payment for the value of the property taken. This principle is claimed to be derived from an analysis of the history of recent lump-sum settlements which have been arrived at through diplomatic channels as a result of prior expropriations. See generally, R. Lillich and B. Weston, International Claims; Their Settlement by Lump Sum Agreements (1975). In a large number of such matters, as a result of diplomatic exchanges and in an

effort to regularize relationships between the expropriating country and the United States or other "capital exporting countries," the expropriators have paid lump-sum settlements which the nation whose nationals lost their property has apportioned among claimants by its own internal legal procedures. Because this historical practice has been followed so frequently, plaintiffs argue that this is now an expression of the practice of nations, and therefor it represents international law. Professor Richard Lillich of the University of Virginia Law School is the editor of a three volume series entitled "The Valuation of Nationalized Property in International Law," published in 1972, 1973 and 1975, and herein referred to as Lillich I, Lillich II and Lillich III. He testified before Judge Bryan that the average of such lump-sum settlements ranges from 40 to 60% of the value of outstanding claims, and plaintiffs urge that the Court should extrapolate a rule from this recent experience and practice of nations to allow only 50% of the value of the expropriated property in this case as a set-off.

It must be noted first that the percentage of claims to be recovered is usually not known at the time that the lump-sum settlement is fixed. The lump-sum settlement is the product of diplomatic bargaining, and the allocation of that lump-sum settlement is usually determined by a Commission in the receiving country. The paying country could not care less how the lump-sum settlement is allocated, and indeed, when the lump-sum settlement is

agreed to, does not know with any finality what the receiving country will compute to be the total value of the expropriated property. The valuation of the expropriated property is no longer of concern to the paying country, if, indeed, it ever was. The percentage of claims satisfied is therefore fortuitous, and of no significance because it is affected by two unknowns: the relative bargaining power of the parties, and the unpredictible outcome of subsequent administrative proceedings to allocate the lump-sum payment among the recipients. True, it is very rare that 100% is recovered. This is because there would be no advantage to the expropriating nation to agree voluntarily to a lump-sum payment which would discharge all of the claims. Were it willing to do so, its ability to negotiate separately with the claimants or grant them access to its own courts, would probably bring in most of the claims at a lower value.

The trading nations now recognize that the day has passed when the capital exporting countries are willing to go to war to protect the most favored nation treaty rights of their nationals, nor do we now send in the Marines to protect American property. When an international crisis arises as a result of expropriation or some other unfairness practiced on American citizens abroad, the immediate anger soon cools, and the advantages of receiving some payment, however meagre, followed by renewed international trade on a regular basis, are usually perceived as more beneficial than holding out for the full

and fair payment of each claim.

That only a small percentage of claims are recovered as a result of lump-sum settlement diplomatic agreements does not allow us to derive a principle of international law from that practice. In our domestic litigation we do not regard the terms of tort or contract damage settlements as establishing a rule of law. Over 90% of the private civil litigation in this country is probably settled by compromise prior to trial. Experience suggests that some plaintiffs get settlements larger than they deserve, and others far less than they are entitled to. We would not look to the percentage settlements in such cases to determine the law of torts or contracts; similarly, lump-sum settlement practice between nations desiring to restore international trade to its level prior to expropriation is an inappropriate source for deriving principles of international law concerning the compensation due for expropriated property. Such settlements are all influenced and distorted by the relative political and economic power of the parties, and their desire to regularize disrupted relationships, factors which are not relevant in attempting to set forth neutral principles of international law.

Before leaving this point it is worthy of note that plaintiffs' claims in this litigation are also in effect expropriated, since the payment of dollars to Cuba is now prevented just as

effectively as the payment of dollars from Cuba. If there were any logic to the rule for which Professor Lillich's testimony was offered, it would apply equally to reduce plaintiffs' and defendants' claims. The Court rejects this contention and adheres to the concept that American citizens in Cuba are and were entitled to full and prompt recompense for their private property seized to be made in funds convertible to dollars. The Court will regard these set-offs as if they had been so converted and paid at the time of the seizure.

American decisional law is reflective of our nation's public policy. However, the courts are not the only institutions declaring public policy. Of more than passing interest is the declaration of Congress found in the legislative history to the "Rule of Law Amendment," § 301(d)(4) of Public Law 88-633, 78 Stat. 1013, adopted as an amendment to the Foreign Assistance Act of 1964 and found in 22 U.S.C. § 2370(e)(2), as extended, amended and presently in effect. This enactment is also called the "Hickenlooper Amendment" in memory of the late Senator Bourke Hickenlooper, its author, and is sometimes also referred to in the literature as the "Sabbatino Amendment" because it intended to reverse the presumption in Sabbatino.

As initially passed by the House of Representatives on June 10, 1964, the Foreign Assistance Act of 1964 had no reference to the Rule of Law amendment. It

was passed in the Senate and inserted as a result of Conference Committee work. The Committee on Foreign Relations of the United States Senate, by report dated July 10, 1964, states:

> "The amendment is intended to reverse in part the recent decision of the Supreme Court in Banco Nacional de Cuba v. Sabbatino [376 U.S. 398 (1964)] .... The Act of State doctrine has been applied by U.S. courts to determine that the actions of a foreign sovereign cannot be challenged in private litigation. The Supreme Court extended this doctrine in the Sabbatino decision so as to preclude U. S. courts from inquiring into acts of foreign states, even though these acts have been denounced by the State Department as contrary to international law."

The Congressional Record references contemporaneous with the adoption of this statute, show expressions of American public policy:

"Certainly the United States should not become an international 'thieves' market.'" Cong. Rec. p. 18937.

At Cong. Rec. p. 18946, August 14, 1964, it is stated:

> "January 1, 1959 is the date of the coming to power of the Castro regime in Cuba and the beginning

> of the greatest series of illegal takings of American property in recent history."

The Legislative History includes at p. 22849 the remarks of Congressman Adair, in the House debate, explaining to the House why the Conference Committee had concurred in the Hickenlooper Amendment. He said:

> "In our conference report we have said that federal and state courts are to be free in cases before them involving acts of foreign states to enforce principles of intenational law. <u>These principles, as applied by our courts, are to include the requirement for prompt, adequate and effective compensation in cases of expropriation.</u>" (Emphasis added.)

Senator Hickenlooper's own extension of remarks at p. A5157 in the 1964 Appendix to the Congressional Record again uses the words "prompt, adequate and effective compensation." The same Legislative History makes clear that §620(e)(2), referring to principles of international law, including principles of compensation, refers back to §620(e)(1), which defines the obligations of international law to include "speedy compensation ... in convertible foreign exchange equivalent to the full value" of the property expropriated.

Similarly, the statement of the President on October 17, 1964, when he

signed Public Law 88-666, which authorized the Foreign Claims Settlement Commission to determine the amount and validity of claims of United States nationals against the Government of Cuba, noted that "a billion dollars worth of property of United States nationals was expropriated in total disregard for their rights, and that these unlawful seizures violated every standard by which the nations of the free world conduct their affairs."

In considering the violation of international law found in these cases, and the requirement for just, speedy and adequate compensation in convertible funds, which this Court finds to be international law as interpreted by American courts and the Congress of the United States, we should not become lost in revolutionary rhetoric. This is not a case where all private properties were expropriated at once, both from aliens and citizens, because a nation wished to experiment with socialist economic theory. Even the agrarian land reform plan in Cuba did not expropriate all the farms. Those which were more productive than a statutory standard were allowed to remain in private ownership and those below a certain size (1,005 acres) were also allowed to remain in private ownership. It is part of the law of nations that aliens of a nation at peace with the host nation who are allowed to enter for the purpose of trade, bringing their goods, capital and lives under the protection of the host country, should not for purposes of such rights, be treated worse thereafter than a national of the host country would be treated.

The Court recognizes that here we are required to apply international law, not local law. See Sabbatino, supra, 307 F.2d at 860-61. And we should avoid identifying as a principle of international law, what is actually only a policy of our nation, and not a principle cherished by other countries, id. at 861. However, the domestic law of eminent domain imposed on the states by the Fourteenth Amendment to the U. S. Constitution, and apparently in effect against the states in principle since the American Revolution without regard to any state constitutional provisions [see Wilkinson v. Leland, 2 Pet. 627, 656 (1829)], is a satisfactory reference point for valuation principles. This is so because the principles it imports are neutral; neutral in the sense that our courts enforce them, even when it is against our own governmental interest to do so. Allowing the banks to recover going concern value at the time and place of the taking is fair, then, in the sense that this is the standard of valuation we live by, even when our own Government must make the payment. Most expositions of international law by American authorities assert that going concern value should be awarded. See, e.g., Restatements (Second) of the Foreign Relations Law of the United States § 188 (1965); McCosker "Book Values in Nationalizations Settlements" quoted in Lillich II at p. 36. The Foreign Claims Settlement Commission decisions have allowed recovery for going concern value, although the statutory basis for valuing claims was required only to be that "most appropriate to the property and equitable

to the claimant, including but not limited to (i) fair market value, (ii) book value, (iii) going concern value, or (iv) cost of replacement." Cuban Claims Act of 1964, 22 U.S.C. § 1643(b)(A).

IX

Chase's Counterclaim or Set-off as Equipment Trustee

As noted earlier, Chase, as trustee for the benefit of American and other owners of equipment trust certificates, secured by financing leases of railway equipment seized by the Cuban Government in 1960, interposed counter-claims and set-offs in its capacity as such trustee. As of October 1, 1954, the railway equipment, title to which was vested in Chase as trustee, had been leased to the Cuban Northern Railways Company, and the Cuba Railroad Company: On October 13, 1960 the Cuban Government expropriated these assets. Chase claims the sum of $4,073,497.01.

The late Judge Bryan made an oral ruling on this point. He stated on the record on June 25, 1974 as follows (P. 2):

> "As I have previously informed counsel, plaintiff's motion to dismiss the third and fourth counterclaims have been granted, and principally on the grounds that they are not assertable as counterclaims under Rule 13(b) of the Federal Rules of Civil Procedure and on other grounds which I will make clear when I do a comprehensive opinion covering this whole situation. That is number one." (Emphasis added).

Thereafter no party asked the Court for the finding required by Rule 54(b), F.R.Civ.P., which would have permitted entry of a final judgment denying all relief on Chase's claims as Railway Equipment Trustee, thereby making the issue separately appealable. Probably there was no basis for the necessary finding of "no just cause for delay" which would permit entry of such a partial judgment, and thereby balkanize the appeal.

This Court regards the matter as being not free from doubt, and worthy of consideration on an appellate level. But, the assigned judge having expressed himself to the effect that the motions to dismiss "have been granted," renders unnecessary any independent decision at this time by the writer. The rationale of Judge Bryan's conclusion as disclosed in his notes, was to the effect that "Chase may not interpose counterclaims asserted in its fiduciary capacity as Railroad Equipment Trustee in an action brought against Chase in its individual corporate capacity." Judge Bryan regarded Rule 13(b), F.R.Civ.P., as a provision which "does not open the door to counterclaims by one who is not a party to the suit and against whom the plaintiff makes no claim." His bench notes, previously referred to as a "draft opinion" observe:

"Under Rule 13 a counterclaim may only be asserted against an 'opposing party' in the same action. The parties on each side of the counterclaim must be the same in name and capacity as those on either side of the main claim. A defendant can only assert a counterclaim against a plaintiff

who has asserted a claim in that action against that defendant. See, United States v. Timber Access Industries Co., 54 F.R.D. 36, 39-40 (D. Ore. 1971) (dismissing a counterclaim which arose out of contracts between a logger and the United States Government in its proprietary role where the Government had sued not in its proprietary role, but as a trustee); Chambers v. Cameron, 29 F.Supp. 742 (N.D. Ill. 1939) (in suit by trustees for the benefit of the trust, defendant cannot counterclaim against the trustees individually), see also, Tryforos v. Icarian, 49 F.R.D. 1 (N.D. Ill. 1970); Twardzik v. Sepauley, 45 F.R.D. 529 (E.D. Pa. 1968); United States v. Lacy, 116 F.Supp. 15, 21 (N.D. Ala. 1953), rev'd on other grounds, 216 F.2d 223 (5th Cir. 1954); Higgins v. Shenango Pottery Co., 99 F.Supp. 522,

> 524-25 (W.D. Pa. 1951). The same restriction applies to the party who advances the counterclaim. He may counterclaim only in the capacity in which the plaintiff has sought to impose liability upon him. See, Durham v. Bunn, 85 F.Supp. 530 (E.D. Pa. 1949) (action against City tax official for wrongfully arresting plaintiff for non-payment of taxes--official may not counterclaim for recovery of the taxes since defendant was sued as an individual, and is counterclaiming in a representative capacity)."

Judge Bryan referred to Clark on Code Pleading (2nd ed. 1947) at p. 671 as follows:

> Where suit is brought by or against one in a representative capacity, as a trustee, executor, or administrator, the desirability of keeping accounts separate, and of avoiding possible prejudice to the party represented or unfairness or inconvenience to the party bringing suit, is thought to outweigh the policy of allowing the defendants to litigate all controversies in one suit."

And his notes continue:

> "In the case at bar plaintiff Banco Nacional sought relief against Chase in its individual corporate capacity only. No claim was directed against Chase in its separate and independent capacity as Railroad Equipment Trustee. It is as if Chase as individual corporation and Chase as trustee are two separate litigants. Only Chase as a corporation may counterclaim against Banco Nacional because it is only this party who was named and is present in this action."

Judge Bryan's notes observed that:

> "Chase argues that a trustee has a right to sue on a trust claim without joining his cestuis qui trustent and in so doing sues in his individual rather than in his representative capacity, citing Thompson v. Whitmarsh, 100 N.Y. 35 (1885); Toronto General

> Trust Company v. Chicago, Burlington & Quincy Railroad Company, 123 N.Y. 37 (1890), and other cases for this proposition, maintaining that New York law is applicable because under Fed. R. Civ. P. 17(b) a party's 'capacity' is governed by local law. The conflicts of law rules governing interpretation of the word 'capacity' in rule 17(b) are inapplicable to the opposing party doctrine of rule 13(b). See Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969). Under Hanna v. Plumer, 380 U.S. 460 (1965), federal law governs this issue. From this Chase concludes that it is asserting the third and fourth counterclaims in its individual capacity and therefore it is the party opposing Banco Nacional. I cannot accept this conclusion. The cases cited by [Chase] deal only with capacity for purposes of the right to sue. They are inapplicable to the 'opposing party' doctrine of rule 13, Fed. R. Civ. P.

Some courts make an exception to the opposing party rule where the benefits of any recovery by plaintif in one capacity (that in which he is suing) will inure to plaintiff in his other capacity (that in which he is the subject of a counterclaim) and it might be thought that the same rule would apply to a defendant asserting the counterclaim where he will benefit personally from a counterclaim he asserts as a fiduciary or the representative.

In Scott v. United States, 354 F.2d 292 (Ct. Cl. 1965), for example, the Court allowed the United States to assert an unrelated counterclaim for a tax penalty against an individual partner in a suit on a contract brought by the partnership. The partnership consisted of only three partners and it was plain that any recovery by the partnership would inure to the benefit of the individual partners. The Court [in Scott] stated:

> "The decisions disallowing counterclaims against plaintiffs as individuals in actions commenced by them in a representative capacity ... do not require us to continue in the opposite position. Individuals suing as the representative of another or as a fiduciary do not benefit, in any immediate, personal way, from the judgments entered in those suits. But judgments rendered on partnership demands result in an immediate pro rata gain to the individual partners, since they actually own the claim in most senses. Inherent in the notion of ticking off the parties' debts and obligations to achieve an ultimate balance--the concept underlying the counterclaim rules--is the necessary condition that the parties against whom counterclaims may be lodged have a personal, beneficial interest in the claim declared in the complaint or petition. The rulings disallowing counterclaims against plaintiffs suing in a representative capacity

rest on the assumption that such persons do not."

354 F.2d at 300-01. In Burg v. Horn, 37 F.R.D. 562 (E.D.N.Y. 1965), aff'd, 380 F.2d 897 (2d Cir. 1967), the plaintiff, a stockholder and director of a close corporation, sued derivatively the remaining two director-stockholders for breach of fiduciary duty to the corporation. While recognizing the general rule that a stockholder suing derivatively is not subject to personal counterclaims, the court held that a counterclaim against the plaintiff in her personal capacity was proper under the circumstances of the case. In substance, the suit was 'to determine the rights of the three individual parties against one another.' 37 F.R.D. at 563. The derivative form of the suit was less important than the fact that the recovery would have inured to plaintiff's benefit individually.

However, [here] defendant Chase has no beneficial interest in the third and fourth counterclaims. It holds bare legal title as trustee, nothing more. The beneficial interest in the railroad equipment resides not in Chase but in the individual certificate holders, and it is they and not Chase who are the parties opposed to Banco Nacional in these counterclaims.

Chase will not suffer liability to the certificateholders by failing to collect any sums from Cuba. Section nine of Article VI of the 1954 Trust Agreement provides that the trustee 'shall not be answerable for any act or omission to act unless the same shall happen through its own negligence or willful default.'

Although in theory a failure to assert a counter claim here might have qualified as 'negligence' or 'willful default,' it is apparent at this point that Chase has done all it could under the circumstances to attempt to recover for the bondholders, [as it cannot presently acquire in personam or quasi in rem jurisdiction over the Government of Cuba for purposes of a plenary action in any court now open to it].

[Chase's] contention that principles of equity require that the third and fourth counterclaims be allowed here is equally unpersuasive. National City Bank of N.Y. v. Republic of China, 348 U.S. 356 (1955), does not support that position. The Republic of China case merely held that a foreign sovereign who sues in our courts waives immunity on counterclaims [based on the subject matter of a sovereign's suit Id., 364]. It does not waive rights that any individual litigant in our courts would otherwise have, including the right to object to the assertion against it of a counterclaim in violation of the opposing party doctrine. It simply waives to a limited extent its right to object to a counterclaim on the ground of sovereign immunity.

Having failed to meet the requirements of the opposing party rule or fall within the exceptions to it, Chase maintains that the modern trend is to disregard 'such subtle niceties of pleading.' See Aldens, Inc. v. Packel, 524 F.2d 38, 50-51 (3d Cir. 1975), cert. denied, 425 U.S. 943 (1976) (in action by out-of-state retailer against

state Attorney General challenging constitutionality of Pennsylvania Goods and Service Installment Sales Act, lower court's dismissal of counterclaim by Attorney General for declaratory judgment and injunction on ground that cause of action belongs not to the Attorney General but to the Commonwealth was erroneous); Moore-McCormack Lines, Inc. v. McMahon, 235 F.2d 142, 144 (2d Cir. 1956) [in petition by shipowner for exoneration from or limitation of liability arising out of the sinking of vessel, wherein administrators of estates of officers who had lost their lives in the sinking filed claims, shipowner can interpose cross-libels for indemnity on the theory of negligence against the administrators]; 1A Barron & Holtzoff, Federal Practice & Procedure § 398, at 607-08 (Wright ed. 1960); Wright, Federal Courts, 349-50 (2d Ed. 1970). Defendant seeks wholesale abrogation of the opposing party doctrine as a limit on permissive counterclaims under rule 13(b). The cases cited above relate to narrow fact situations not duplicated by the case at bar.

Ultimately, Chase falls back on the argument that unless the third and fourth counterclaims can be asserted in this suit, Cuba will escape liability for those claims because sovereign immunity bars a separate action by Chase or the bondholders against Cuba for the seized railroad equipment. In furtherance of what it considers sound principles of moral responsibility for the expropriation of private property, Chase urges that these counterclaims be made a part of this action. What Chase really questions is the soundness of our rules

of law which grant sovereign nations, in some instances, immunity from suit and which here operates to bar an independent action by the certificateholders against the Cuban Government. Whatever the merits of the position may be, it is not open to this court to change a rule established by the Supreme Court long ago. The Schooner Exchange v. McFaddon, 7 Cranch 116 (1812). To hold otherwise would allow Chase to circumvent the sovereign immunity rules by subjecting the Cuban Government to claims by way of setoff which Chase could not assert directly. While we may not approve of the confiscatory action taken by the Cuban Government, this is not a reason to dilute that Government's rights by expanding the scope of permissive counterclaims."

Judge Bryan declined to reach the issue presented by Banco Nacional's contentions that the "counterclaims should be dismissed because, if they state a claim for relief at all, that claim runs against the Republic of Cuba, but not against Banco Nacional."

Since Judge Bryan did not finally complete his work in this matter, we believe further discussion of the point might be of assistance to the parties and the Court of Appeals. The reform movement in rules of pleading and practice killed off much of the niceties in issues affecting capacity by which the 19th century bar was bemused. Thereby, the issue of what counterclaims or set-offs could be pleaded lost much of its vigor and interest. This is essentially a diversity case, to which New

York substantive law should be applicable, and, if outcome determinative, New York adjective law likewise. Guaranty Trust Co. v. York, 326 U.S. 99 (1945). In most domestic litigation it is of no serious importance if a counterclaim or set-off cannot be asserted, because the party who is prevented by some nicety of pleading or practice rules from asserting his counterclaim or set-off can usually bring a plenary action in his differing capacity, and indeed at least prior to Schaffer v. Heitner, 433 U.S. 186 (1977), such a party defendant could, under the rubric of Harris v. Balk, 198 U.S. 215 (1905) attach the plaintiff's very claim, in the jurisdiction in which plaintiff was litigating, and gain quasi in rem jurisdiction to the extent of that claim, in that district, to support a plenary action. The actions could usually be consolidated for trial, and the whole issue thrashed out together even if pleading niceties prevented a counterclaim or set-off being pleaded because of differing capacities. So the problem seldom arose. Such practical resolution of counterclaims held in a different capacity is not open to Chase in this case because with limitations not here relevant, Banco Nacional is immune, as an instrumentality of the Cuban Government, from suit in this District or in the state courts, except to the extent that a set-off can be pleaded as an affirmative defense. Because of the ready availability of a plenary lawsuit in lieu of the counterclaim which would have been permitted but for the difference in capacity, the likelihood that an issue of mutuality of set-off would be litigated today in this jurisdiction under any other circumstances is remote.

Set-offs are and have historically been favored in New York both by statute and by general principles of equity. See Beecher v. Vogt Manufacturing Co., 227 N.Y. 468 (1920); Morris v. Windsor Trust Company, 213 N.Y. 27 (1914). Getlan v. Hofstra University, 41 A.D.2d 830, 342 N.Y.S.2d 44 (1973) and § 3019(a) of the New York CPLR. In Beecher, then Judge Cardozo held, in a case where a plaintiff sued in a fiduciary capacity, that any set-off raised by defendant must be a claim against the plaintiff in its same fiduciary capacity, and not against the plaintiff in his individual capacity, stating "[d]ebts, to be applied against each other, must be mutual ... to be mutual they must be due to and from the same persons in the same capacity." Beecher at 473. This conclusion is in keeping with the well-established rule in New York that an individual or corporation may have two wholly distinct capacities as a fiduciary, and as a personal, or corporate entity in its own right. Leonard v. Pierce, 182 N.Y. 431 (1905). See also, New York EPTL, § 11-4.1, effective September 1, 1967, but considered to be declaratory of existing law.

The principle limiting the use of set-offs appears to apply under New York law in the converse situation where an individual attempts to employ a personal claim to offset a claim against him in his fiduciary capacity. Thus, it has been held that a defendant who holds a personal judgment against the plaintiff cannot use that judgment as a set-off if the plaintiff sues defendant in a fiduciary rather than a personal capacity. Morris v. Windsor Trust

Co., supra; Weeks v. O'Brien, 28 App.Div. 206, 49 N.Y.S. 344 (1898); Hoschek v. National Surety Co., 139 Misc. 683, 248 N.Y.S. 203 (App. Term 2d Dept. 1930).

If a defendant were permitted to reduce his own personal liability by the use of claims he owned on behalf of a trust, this might lead to a violation of his duties as trustee, particularly if the trustee were in a financial condition where his duty to the beneficiaries of the trust required him to assert the set-off, but upon prevailing it lacked funds in its individual corporate capacity to pay into the trust account the amount set-off. Part of the intellectual underpinning of the rule, if it has any, is that a fiduciary may not use the subject matter of his trust for his own profit, and the further rule that he must keep the trust property separate from his own personal property. See New York EPTL § 11-1.6(a) (effective September 1, 1967, but declaratory of existing New York law).

Another issue presented with respect to Chase's trustee claims is whether the law of New York applies or whether the right to assert a set-off or plead a counterclaim in a diversity case should be controlled by federal procedural rules. Rule 17(b), F.R.Civ.P. requires that the capacity of a person to maintain a suit in a representative or fiduciary capacity must be "determined by the law of the state in which the district court is held." See Cooper v. American Airlines, 149 F.2d 355 (2d Cir. 1945). This suggests that Chase's

right to assert the counterclaim in its capacity as trustee depends on applicable New York law. Probably the law of New York, as indicated above, does not permit a person to assert claims that he holds as a fiduciary as an off-set against claims directed at him in his personal capacity. However, Rules 13(a) and (b), F.R.Civ.P. do not appear on their face to restrict the setting up of a counterclaim or off-set by a defendant simply because the counterclaim or off-set belongs to him in a different capacity. Generally, under the doctrine of Hanna v. Plumer, supra, once the district court determines that it has jurisdiction over the parties, and that the parties have capacity to sue and be sued, the Federal Rules of Civil Procedure should be applied to procedural matters. Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1979); Avondale Shipyards, Inc. v. Propulsion Systems, Inc., 53 F.R.D. 341 (E.D. La. 1971); G & M Tire Co. Inc. v. Dunlop Tire & Rubber Co., 36 F.R.D. 440 (N.D. Miss. 1964). Despite its general language, the facts in Tolson do not involve the assertion by a fiduciary of claims held in such capacity to reduce the ficuciary's own personal liability to the opposing party. In Tolson plaintiff sued an administratrix who counterclaimed in her fiduciary capacity only. In the case of Chase, there is probably not the same logical relationship between defendant's claim as trustee against plaintiff and plaintiff's claim against defendant in its own corporate capacity such as Rule 13(a) would require to be pleaded as a set-off to reduce the trustee's own personal liability. In this case, defendant's set-off claims arose

out of the same general occurrence as the claims asserted by plaintiff, that is to say, the Cuban Revolution, but the defendant's set-off claims here do not bear the logical relationship to the plaintiff's claims such as to make the set-offs compulsory under Rule 13(a). See Harris v. Steinem, 571 F.2d 119 (2d Cir. 1978).

Defendant's arguments for allowing the set-off, stated in terms of "policy considerations" and "substantial justice," are tempting arguments, but if allowed, may be productive of vast mischief. While we would seek to do justice in the matter, we cannot part from our established procedures and rules in order to do so. It is purely fortuitous that Chase, against which plaintiff has asserted a claim, happens to be the trustee of these two equipment trusts. If the trustee were a different entity, or if Chase did not happen to be indebted to Banco Nacional, no set-off would be available. Presumably, other Cuban equipment trusts held by other American trustees are not so fortunate. If the set-off were permitted in this case, the next logical step is to permit an assignee or person who has purchased a Cuban claim, to assert a set-off. This would bring forth a brisk and undesirable trading in claims against Cuban corporations or the Cuban state, to become available for purposes of set-off, and where will it stop?

When we focus on the question of trustee identity, evolution of the law concerning trusts has left an unclear result.

At common law, a trustee held legal title to the trust property in his own name and could sue in his own name for an injury to the trust property. Toronto General Trust Co. v. Chicago, Burlington & Quincy Railroad Co., 123 N.Y. 37 (1890). A single person acting as trustee of two trusts could not litigate against himself at common law, but would have to resolve any such dispute either by resigning and permitting a successor trustee to litigate, or by resort to equity. In United States Trust Company of New York v. Bingham, 301 N.Y. 1 (1950) the lower courts had allowed a trust company to appear in a proceeding for the judicial settlement of fiduciary accounts of its sole trusteeship of the Payne trusts, against which the Estate of one Ledyard, of which the same fiduciary was executor, had a claim for trustee commissions earned by Ledyard during his lifetime, and to litigate that issue against itself. Distinguishing Fisher v. Banta, 66 N.Y. 468 (1876), which held that the administrator of an estate cannot account to himself as executor of a deceased beneficiary of the same estate, the New York Court of Appeals affirmed. In Bingham the Trust Company was represented in its separate capacities by two different attorneys. The dissenting opinion of Judge Desmond states the case simply:

> "The simple, unavoidable question here is as to whether the Trust Company, as claimant (for the Ledyard estate) could, alone and to the exclusion of anyone

> beneficially interested in the Ledyard estate, carry on a litigation against the alleged debtor (the Trust Company itself, as Payne trustee) and get a judgment therein which would conclude the Ledyard estate and its beneficiaries. I do not see how it is possible to give any but a negative answer to that question.
>
> 'It is elementary that the same person cannot be both plaintiff and defendant at the same time in the same action. It is incongruous that the same person should direct and conduct both the prosecution and the defense of the same suit, no matter in what capacity he may appear. * * * And the rule has been applied where the same person sues and defends in different capacities.' (Globe & Rutgers Fire Ins. Co. v. Hines, 273 F. 774, 777 [C.C.A.2d], certiorari denied 257 U.S. 643)."

See also, Trustees, etc. v. Stewart, 27 Barb. 553 (S. Ct. Cayuga Co. 1858).

On the same day that the Court of Appeals decided Bingham, but presumably without foreknowledge, Mr. Justice Eder of the New York Supreme Court, New York County, considered an unusual fact situation in Krooss v. Maue, 97 N.Y.S.2d 415 (1950). In an action concerning real property, Elise Krooss, as executrix of a decedent's

estate, had sued her son John H. Krooss and her son-in-law, Peter H. Maue individually and as representative of another decedent's estate. Following the death of Elise Krooss, John H. Krooss, one of the co-defendants in his individual capacity, became successor executor and sought to be substituted as plaintiff and to continue the litigation. Justice Eder held as follows:

> "The application presents an important question, viz., whether the movant, who is a defendant in this action in his individual capacity, can now continue the action in a representative capacity as successor to his mother against himself and his codefendant who is his deceased sister's representative.
> * * *
> If the application is granted, this, in effect, would permit the movant John H. Krooss to be a plaintiff in a representative capacity, and a defendant in an individual capacity in one and the same case. Such a situation is an anomalous one and, to permit such a procedure, is irregular and may result in prejudice to the rights of other parties, and create confusion.

In New Jersey, where a comparable situation was presented --Shippee v. Shippee, 122 N.J.Eq. 570, 195 A. 728, the court took the position that a man cannot, in his individual capacity, sue himself in his capacity as executor. The rule must similarly apply to a converse situation.

> In 24 Corpus Juris, § 2043, p. 812, the rule is stated as follows: 'The courts do not permit a party to be both plaintiff and defendant in the same action and therefore it is not competent for a personal representative acting in his representative capacity to sue himself in his individual capacity. The rule is not altered by the fact that his co-representative is joined with him as co-plaintiff, but the pleading may be amended by striking out his name as co-plaintiff. On the other hand, a personal representative cannot maintain a suit in his individual capacity against himself in his representative capacity.' See, also, 34 C.J.S.. Executors and Administrators, § 689.
>
> This is a logical conclusion and one with which I am in accord and, in consequence, I am unable to see that the same person, by the addition of a

> designation, can thus overcome the prohibition which otherwise exists. In other words, a person, by acting as executor or trustee, does not thereby become a separate entity like a corporation; he continues to be, and is, the same natural person as he is in his individual capacity." (Emphasis added).

When Krooss reached the Appellate Division on October 17th of the same year, the order was unanimously reversed, without citation of Bingham. The First Department held by memorandum (100 N.Y.2d 226):

> "There is no conflict of interest between appellant in his individual and representative capacities. On the pleadings his position as defendant is identical with plaintiff's position and the contest is between the Krooss Estate, now represented by appellant as administrator, and respondent Maue. It is proper under the circumstances for appellant to be substituted as plaintiff."

Later, in Bederman v. Moskowitz, 139 N.Y.2d 352 (Sup.Ct. Kings Co. 1955) the court, citing Krooss, but making no reference whatever to Bingham, held:

> "A party may not in his individual capacity sue

himself in his representative capacity where his position is inconsistent and hostile with his representative capacity. The court is not unmindful of the case of Krooss v. Maue, 198 Misc. 397, 97 N.Y.S.2d 415, which held that the one who is a defendant in an individual capacity cannot continue the action in a representative capacity as successor to another against himself and his co-defendant, which was reversed by the Appellate Division, 277 App.Div. 973, 100 N.Y.S.2d 226. The distinction between the matter on hand and the Krooss case lies in the fact that the latter case, as noted by the Appellate Division, there was no conflict of interest between the defendant in his individual and representative capacities. Such is not the situation here. Accordingly, the motion is denied, with leave to renew at such time when a person other than the plaintiff has qualified as a representative of the estate of the deceased."

Bederman was an action to recover damages for conversion of jewelry owned by the plaintiff, entrusted to her sister, now deceased, who had been defendant's wife. Later, in Murphy v. Christoffers, 55

Misc.2d 879, 286 N.Y.S.2d 939 (Dist.Ct. Nassau Co. 1968) citing Krooss but not Bingham, a father, as guardian ad litem for an infant plaintiff, was permitted to maintain litigation against his wife and another as co-executors of a decedent who had a claim against the decedent. The Court held that notwithstanding the common law unity of interest which the parents had as guardians and custodians of the infant plaintiff, there was no conflict of interest between the plaintiff, appearing by a guardian ad litem, in a common interest with the guardian's wife on the one side, against the deceased defendant's estate of which the guardian's wife was co-executrix, on the other.

The most that can be derived from the foregoing cases, and the Bingham case, supra, which involved an inter vivos trust instrument, creating an express trust of the same nature as that which Chase accepted for the benefit of the railway equipment investors, is that the New York trustee may well have become an entity separate from himself, so that he can sue himself by separate counsel, and that the rule of Toronto General Trust Co., supra no longer has validity. If this is true, then it may be concluded that Chase as legal title holder could no longer sue in its own name in New York as a matter of capacity to sue, and accordingly it cannot sue plaintiff in that fashion here, nor can it plead the claims to which it holds legal title as trustee as a set-off.

X

The Cuban Branches as an Entity

The Cuban branches were not separately incorporated. By reason of American law, neither Chase nor Citibank could have owned and operated its Cuban branches as subsidiary corporations organized under Cuban or American law. See 12 U.S.C. § 601. Nor could these national banks have placed at risk in Cuba all of their general assets wheresoever located. Id. On the books of the home office the branches were treated collectively as a separate enterprise from the domestic banking operations. The books of account showed the total capital invested in or allocated to the Cuban operations, and a daily balance was struck showing "indebtedness" between the Cuban operation and the bank as a whole, as if the Cuban operation were a separate enterprise. This was in accordance with customary foreign banking operations of American banks. It was also apparently in compliance with Cuban banking regulations. For example, Exhibit C4 shows that Chase forwarded to Banco Nacional bonds amounting to $1,978,000 to create "capital and reserve" in accordance with Article 105 of Cuban Law No. 13 of December 23, 1948, establishing Banco Nacional, and that this figure was derived as representing 5% of demand deposits in Chase's Cuban operations as of April 27, 1950. The minutes of the directors of Chase at a meeting held on October 6, 1937, assigned $100,000 to the capital of Chase's Havana branch.

Similarly, minutes of the board of directors of Citibank on December 31, 1924 show authority to open a branch bank at Havana, "and that this corporation use in connection with its banking business in the Republic of Cuba, an amount of capital not exceeding $100,000."

Between the commencement of banking in Cuba in 1925, and 1937, Chase had caused its Cuban branch to "borrow" from the main office in New York, those funds, which together with deposits, permitted the Cuban branch to conduct its day to day operations. In effect, the branch in Havana was permitted to "overdraw" its checking account in dollars with the main office, so that the reflection on the books at the main office in New York would be a negative balance in the Havana branch checking account. This appears from the deposition of Michael P. Esposito, Jr., taken April 10, 1974, Exhibit G. This practice continued until the capital loan of 1937, made from the head office to the Cuban branch as "allocated capital" mentioned above. Additional sums were allocated in the 1950's to other Cuban branches in accordance with resolutions of Chase's board of directors.

Chase's Cuban branches always had resident officers, but never had a separate board of directors. These officers were always selected by the board of directors in New York. By resolution of the Bank's board of directors, branches were established as follows: Havana, January 12, 1925; Vedado, February 1, 1951; Marianao, April 2, 1951; and Amistad, June 1, 1954. Capital at $5,000 each had been assigned to the Vedado, Marianao and Amistad branches

from the New York office at about the time they opened. To permit the Bank's branches in Cuba to have adequate funds for their day to day operations, credit slips were also issued, including a credit slip on April 9, 1951 for $1,978,452.45; another on December 22, 1955 for $50,000; another on December 13, 1956 for $167,000; and one on October 24, 1957 for $1,804,547.55.

We see, therefore, in the case of both banks, that the branches were operated as a separate enterprise for bookkeeping purposes, and treated as a separate "profit center," making payments to and receiving payments from their head office in New York. Furthermore, prior to confiscation, the Cuban Government and Banco Nacional treated the Cuban branches as distinct entities independent of their head office for purposes of banking regulation and taxation.

Prior to the enactment of Law No. 13 of 1948, which established Banco Nacional, there was little statutory regulation of the banking business in Cuba. The commercial code required maintenance of a minimum legal cash reserve of 25% of deposit liabilities. For purposes of enforcing this code, the only liabilities considered were those of the Cuban branches, not of the entire bank. As noted above, when required to subscribe to Banco Nacional stock in proportion to their shares of the deposits of all banks in Cuba, Chase and Citibank did so solely with reference to deposits in their Cuban branches. Just prior to confiscation, and at all prior times, Banco Nacional had

recognized the obligations of the Cuban branches to repay to the head office such items as profits, overdrafts and amounts due with respect to letters of credit which the branches had caused the head office to open in New York in favor of Cuban businesses. Cuba had permitted remission of such amounts to New York along with other similar transactions except that the last two years profits were not remitted because of restrictions placed on foreign exchange.

The bank examination function was performed in Cuba by Banco Nacional. It recognized as valid the bookkeeping records of the banks, including the liability items on the financial statements shown as owed to the home office representing capital and reserves. Taxes imposed by Cuba on profits were related solely to the profits of the Cuban branches. The entire books of account of these national banks were also under the continuous supervision of the bank examiners employed by the Comptroller of the Currency of the United States. See, 12 C.F.R. §§ 4.2, 4.11.

While it is certainly true as a matter of law that "the branch in Havana could no more be indebted to the head office than the branch on Pine Street could be indebted to a branch on Broadway," (Mr. Rabinowitz, quoted from p. 16 of hearing held before me July 20, 1978), it remains true that the Cuban Government, the banks themselves, and the Comptroller of the Currency treated the Cuban branches at least for all value-related purposes, as independent banking enterprises. As such,

the branches were amenable to sale or disposition, and as it turned out, they were amenable to confiscation without payment, all separately from the home office. The profits or losses of the Cuban branches were included in the consolidated annual reports to shareholders by each bank, except that unremitted profits in 1959 and 1960 were generally carried as unearned income on the balance sheets. For the last two years the profits had not been remitted, solely for lack of foreign exchange remittance permits, although such permits were being routinely granted for ordinary commercial transactions regarded as helpful to the Cuban economy.

From the point of view of economics, the branches of the respective banks, each treated as a single enterprise, should be valued with the same effect as if each were an independent entity, or a subsidiary corporation. In valuation, we must look to the economic realities, which should not be distorted by reference to the legal theory under which the economic entity (branch bank) was conducted or formed.

The concept that the bank branches in Cuba are an independent economic entity has of course no bearing on the theory advanced by Chase that the book entries for the net debt of the branches to the home office form a basis for contending that this debt in effect was taken over, confiscated or assumed by Banco Nacional when the branches were confiscated. The damages to be recovered here by Chase as set-off cannot exceed the value of the asset in place at the time that it was taken, without adjustment

for any chilling effect on its value resulting from the taking. This valuation question is discussed further below. Ordinarily, branches of this sort, which have been profitable for all or most of their history and have a going concern value, should be expected to be worth more than the total historic "debt" which they owe to the home office. But the historic amount of any such debt cannot in logic be taken as the value of what was expropriated.

XI

Valuation

Discussion of the valuation of the confiscated branches may begin with Judge Frank's admonition in Commissioner of Internal Revenue v. Marshall, 125 F.2d 943 (2d Cir. 1942), that we need to recognize:

> "The eely character of the word 'value.' It is a bewitching word which, for years, has disturbed mental peace and caused numerous useless debates. Perhaps it would be better for the peace of man's mind if the word were abolished. Reams of good paper and gallons of good ink have been wasted by those who have tried to give a constant and precise meaning. The truth is that it has different meanings in different contexts ...." 125 F.2d at 946.

A threshold question concerns whether the banks are entitled to compensation for the Cuban branches on a going concern basis, rather than merely at the value of the sum of the constituent parts. As a matter of principle it seems clear that the defendants are entitled to assert their set-off by valuation on a going concern basis. This conclusion follows because the Cuban Government expropriated the branches, including the assets, liabilities, customer lists and books and records, and continued to use them as a going banking operation in the name of Banco Nacional, with the same effect as if they had been merged with the domestic banking operations of Banco Nacional. This was done with the intention to run these branches as banks, as part of the national banking system. This is not the case where a going concern is taken over by an expropriating nation simply in order to liquidate it, nor is it the case where a host nation simply orders a particular business or type of business to cease operations. When a business is taken over to be operated as a going concern, the owner becomes entitled to compensation for the value of that business as a going concern. This result could follow on the theory that there was a contract implied in fact that Banco Nacional or the Cuban Government would pay compensation. Contracts implied in fact require the assent of the person to be charged, or conduct from which such assent may be inferred. Grombach Productions, Inc. v. Waring. 293 N.Y. 609 (1944); Miller v. Schloss, 218 N.Y. 400 (1916). Here, the statute on its face contemplated payment by the issuance of bonds, although such bonds were never issued.

It is doubtful that the Cuban Government or Banco Nacional, the parties charged in this case ever intended to fix the value and issue the bonds, or that they may be found to have "agreed" to compensate the banks for any of the branches seized. The statute required valuation by Banco Nacional as of the end of the year, but there is no evidence it ever did so.

However, the defendant banks may also recover on the theory that there was a contract implied in law, or a quasi-contract "is not a contract or promise at all. It is an obligation which the law creates, in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not retain it, and which et aequo et bono belongs to another." Miller v. Schloss, supra, at 407. In order to recover under this theory, defendants must show that Banco Nacional or the Cuban Government was unjustly enriched at their expense, and that "...the circumstances were such that in equity and good conscience [Banco Nacional or the Cuban Government] should make restitution." Chase Manhattan Bank, N.A. v. Banque Intra, S.A., 274 F.Supp. 496, 499 (S.D.N.Y. 1967); see also Silberblatt, Inc. v. East Harlem Pilot Block, No. 78-6191 (2d Cir. October 1, 1979). Having taken over these branches and their accounts, deposits and assets, and having thereafter operated the branches as branch banks for its/their own account, Banco Nacional and/or the Cuban Government are bound to make restitution on principles of

quasi-contract, in addition to being so obligated under the principles of international law discussed supra, pp. 29, et seq.

The applicable value will be that which our own Government would pay to a domestic corporation under our laws of eminent domain. This basic standard of valuation is market value, "what a willing buyer would pay in cash to a willing seller." United States v. Miller, 317 U.S. 369, 374 (1943). That there are no willing buyers around, or that the property taken is not of a sort which is fungible or generally bought and sold, does not detract from the validity of the theory nor prevent its application.

Distinguishable are those cases where only land upon which a business is conducted is taken, and where the business itself does not change ownership from private to public control. Where the owner of a business may remove it to another place, reestablish his business, carrying his good will with him, there will be no compensation for the damage to good will, or for the loss of any other intangible value that accrues when a business establishes itself as a "going concern." See Banner Milling Co. v. State. 240 N.Y. 533, 540-41, cert. denied 269 U.S. 582 (1925). The Supreme Court has decided similar cases, where a condemning authority has taken over a business and continued to operate it for its own benefit. In such cases, the business is generally valued as a going concern, including recovery for good will or going concern value. See Kimble Laundry Company v. United States, 338

U.S. 1, 8-20 (1949); City of Denver v. Denver Union Water Company, 246 U.S. 178, 191-92 (1918); City of Omaha v. Omaha Water Company, 218 U.S. 180, 202-03 (1910).

Notwithstanding the statutory provisions of the Cuban Claims act of 1964, 22 U.S.C. § 1643(b)(A) quoted supra, p. 42, the customary practice of the Foreign Claims Settlement Commission, as explained by Professor Lillich, was generally to refuse recovery for good will, largely because of the problems of proving it. See Lillich I at 100-15. However, with the decision on the claim of First National Bank of Boston, FCSC Ann. Rep. 33 (1969), the Commission reversed this policy. Adjudications by the FCSC in connection with claims regarding the Cuban branches of Chase and Citibank, discussed infra, p. 76, did allow good will to the extent the existence of it could be shown.

A second issue which arises in valuing the Cuban branches is whether and to what extent the Court should take into account conduct of the Government prior to nationalization, which had a threatening or chilling effect on the value of the branches. As noted, the Cuban Revolution produced sweeping economic and social changes, which had a general debilitating effect on the Cuban economy. During this period the level of activity and the value of defendants' businesses in Cuba declined. This decline can be attributed generally to several causes, including: (i) increased stringency in currency controls which impeded international trade and trade with the United States, areas in which Chase and Citibank had

enjoyed a competitive advantage over other banks in Cuba; (ii) the taking over by Interventors, appointed by the Cuban Government, of business properties belonging to Cubans who had fled the realm. These political functionaries naturally elected to do their domestic banking with Banco Nacional instead of Chase or Citibank; (iii) land reform, which eliminated the large private agricultural producers, some of which were American owned, and most of which had needfor international banking services; (iv) general economic depression due to decreased tourism, decreased economic activity, hostile actions of the American Congress and State Department; and (v) just plain hard times.

There are numerous authorities to the effect that the prior depressing effect of the threat of nationalization by the nationalizing country are to be disregarded in fixing value of expropriated property. Authorities include the Case Concerning the Factory at Chorzow, P.C.I.J. Ser. A No. 17 at 47; Restatement (Second) of the Foreign Relations Law of the United States § 188 Comment b (1965); Lillich, "The Valuation of Nationalized Property by the Foreign Claims Settlement Commission" in Lillich I, pp. 95 and 97, n. 13; Almota Farmer's Elevator and Warehouse Company v. United States, 409 U.S. 470, 478 (1973). The decisions of the Foreign Claims Settlement Commission accept this argument by using earnings figures from the pre-revolutionary period in Cuba. See, e.g., Claim of First National City Bank, proposed Decision No. CU-3835 (September 3, 1969). Claim of Intercontinental Hotels Corporation, Decision No. CU-4545 (April 13, 1970).

The Commentary to the Restatement suggests:

> "So far as practicable, full value must be determined as of the time of the taking, unaffected by the taking, by other related takings, or by conduct attributable to the taking state and having the effect of depressing the value of the property in anticipation of the taking.
>
> This does not require, however, disregard of the effect on market values of the state's general power to regulate the use of property or the conduct of business operations." Restatement (Second) of the Foreign Relations Law of the United States, § 188 Comment b (1965).

The argument goes so far as to suggest that this approach to valuation is essential, lest the amount of compensation be left wholly in the power of the nationalizing government.

In opposition, plaintiffs make an argument which expresses reality. Plaintiff's counsel expresses a very telling analysis (p. 21 of post-trial hearing held July 20, 1978) to the effect that:

> "[I]t is possible to pretend that there was no revolution. It is possible to pretend that the sugar quota was still in existence. It was possible to pretend that the

> casinos were still running in Havana, and that the tourist trade was still running in Havana and to say, well, ... in 1957 or 1958 they made a lot of money, so we will project that into an imaginary future. It is possible to do that."

And, we may add, it is possible to pretend that the propertied and professional classes had not fled the revolution; and that the successful plantations had not been extinguished by agrarian reform. All of these assumptions are possible to make, but they are not justified by reality.

It was not a violation of international law, of which these defendants have standing to complain, for Cuba to engage in agrarian reform. Indeed on its face, the Agrarian Reform Law does provide for compensation, although in fact no compensation was paid to American owners. Nor it it a violation for a nation to readjust its economy and change the methods of organizing its local and international trade. Many of the adverse effects on the value of the branch banks in Cuba did not arise from wrongdoing, or the chilling result of projected takings, as are contemplated by the rule suggested in the Restatement. On the facts of this case, we cannot attribute the entire downturn in the value of the branch banks to any improper chilling effect exerted by the Cuban Government on these banks prior to expropriation.

Investments in foreign countries where the political climate is unstable obviously present higher risks, as foreign investors must realize. It would be a novel theory indeed that holds a foreign nation liable to make compensation to foreigners solely for damage ensuing by reason of basic changes in the social contract, though they be radical changes. The right to effect such changes is an incident of sovereignty. It is apparent that the Cuban Government, or our own Government could take numerous steps which would have been detrimental to a business, without giving rise to any right of compensation on the part of that business. Even under our own Constitution, an outright ban on sale of a manufacturer's product, such as we experienced during National Prohibition, may be enacted, resulting in ruin to a business, but no right to compensation therefor would be recognized. See, e.g., Mugler v. Kansas, 123 U.S. 623 (1887); Samuels v. McCurdy, 267 U.S. 188 (1925) and cases therein cited.

Defendants, by asking the Court to disregard totally the depressing effect on their business of the events of 1959-60, seek compensation in part for the business losses they incurred as a result of those events. Defendants are entitled to compensation only if and to the extent that the events which led to those losses were actions of the Cuban Government in violation of international law, typically including confiscation, and the chilling of the value of the asset prior to seizure which occurred when confiscation became a foreseeable certainty. There does not appear to be a legal basis to award

compensation to defendants for that portion of their losses in the value of their business resulting solely from secular change in Cuba.

It would be inappropriate to project the profits of the Cuban branches prior to 1959 to value the underlying business, and accordingly the valuation must be computed based on circumstances as they existed shortly prior to the time the banks were taken over. Such value will be fixed, whoever, without regard to the retaliation foreseeable when the Soviet barter agreement was followed by the termination of the Cuban sugar import quota to the United States. Once confiscation of the American banks became foreseeable, they had no market value, and this is shown by the testimony of Citibank's expert witness, Morris Schapior (Trail Tr., Jan. 12, 1977, pp. 494-509).

XII

Pre-judgment Interest

Also at issue here is the question of whether the palintiffs' claims, and the defendants' set-offs to the extent allowed, are entitled to accrue pre-judgment interest. Much time has elapsed since the claims arose, and such interest would amount to much more than the principal amount by the time appellate review is complete with respect to the final judgments to be entered herein.

Interest, as damages for the delay in payment of money or other legal obligations, as distinct form contractural interest, is a matter of substantive right,

and the law of the place where the cause of action arose, or the law of the place of performance of the contract duty to pay rather than the law of the forum, determines whether there is a right to such interest and the rate thereof. See Fanning v. Consequa, 17 Johns. 511 (1820) and cases therein cited.

Under Erie principles, whether the plaintiff in this dispute is entitled to pre-judgment interest will be a question of New York Law. The debt sued upon is here, the defendants are here, and New York was the place where Chase and Citibank should have credited Banco Nacional with the sums due in these actions.

Section 5001, New York CPLR, which as to claims at law reenacted prior statutory provision without substantive change, provides that pre-judgment interest shall be recovered "upon a sum awarded because of a breach of performance of a contract, or because of an acto or mission depriving or otherwise interfering with title to or possession or enjoyment of, property." Historically, in New York the right to pre-judgment interest has not been as absolute as a literal reading of the statute would suggest. Generally prejudgment interest has been awarded either in he nature of a penalty, or as damages for the withholding of the payment of money, or for the purpose of awarding just compensation, and therefore as a part of the computation of the total damages which whould be required to be paid in order to effect a just indemnity. See generally, Van Rensselaer v. Jewett, 2 N.Y.

135, 140 (1849) and Prager v. N.J. Fidelity & Plate Glass Insurance Co., 245 N.Y. 1, 6 (1927, Cardozo, Ch. J.).

Ordinarily the New York courts award pre-judgment interest on money from the time when the money becomes due and payable. Expressed differently, interest is said to be an invariable legal incident of the principal debt only whenever a debtor knows precisely what he is to pay and when he is to pay, but does not. Gray v. Prudential Insurance Co., 46 N.Y.S.2d 850 (Sup.Ct. N.Y. Co. 1943) rev'd on other grounds, 267 A.D. 688, 48 N.Y.S.2d 82 (1st Dept. 1944). There is an exception of long standing to the award of pre-judgment interest by way of damages for the detention of a debt. Whenever the law prohibits payment of the principal, interest during the existence of the prohibition is not demandable. See Wheelock v. Tanner, 39 N.Y. 481, 504 (1868); Moscow Fire Insurance Co., v. Heckscher & Gottlieb, 260 A.D. 646, 648, 23 N.Y.S.2d 424 (1st Dept. 1940), aff'd 285 N.Y. 674, 34 N.E.2d 377 (1941). An analogous New York statute, § 100-b(4) of the Banking Law, provides that a trust company is not required to allow interest upon uninvested funds held by it as a fiduciary where payment of the principal is prohibited under any order, regulation or ruling issued under or pursuant to the Trading With the Enemy Act.

The logical basis for these rules is applicable here. Remittances to Cuba have been, during the relevant time period, prevented by federal law, 31 C.F.R. § 515,

and payment by Chase of the ultimate balances found due was impossible at all relevant times. There is no basis for distinguishing between blocking of funds, and judicial obstruction, such as an injunction, both of which prevent payment by a debtor.

Traditionally, in cases of insolvency or bankruptcy, no interest is allowed, unless there are surplus funds available for that purpose. Courts considering the withholding of interest in such a situation have traditionally observed that "delay in the payment of a claim undoubtedly results in injury to the creditor. He does not receive full compensation unless interest is paid to him during the time in which payment of his claim is postponed. But the delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate." In re Application of Stoddard, 249 N.Y. 139 (1928). Here, in the instant case, the debts to and from Cuba although due, were at no time payable, and for that reason they should not bear any prejudgment interest. Indeed, they are not payable now, and may not be payable after the judgment of this Court has been processed through final appellate review.

XIII

Effect of the Determination of Damages by the Foreign Claims Settlement Commission

Citibank argued before Judge Bryan that this Court may, and indeed must, adopt the damage figure certified by the Foreign Claims Settlement Commission to represent Citibank's loss in Cuba. While this Court

believes that the determination of the Foreign Claims Settlement Commission has some evidentiary value, and is admissible and available for consideration by the Court under Rule 803(8)(a) and (c), F.R.Evid., the result is binding neither on this Court nor on plaintiff.

Citibank relies on a general provision in the Act establishing the Foreign Claims Settlement Commission to support this argument. The relevant language, in 22 U.S.C. § 1623(h), is as follows:

> "The action of the Commission in allowing or denying any claim under this subchapter shall be final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any other official, department, agency, or establishment of the United States or by any court by mandamus or otherwise."

In addition, Citibank relies on 22 U.S.C. § 1623(b), which reads in relevant part as follows:

> "Each decision by the Commission pursuant to this subchapter shall ... constitute a full and final disposition of the case in which the decision is rendered."

When read together as a part of the total statutory scheme, as they must be, these provisions are considered merely to prevent judicial tinkering with the total amount of loss certified by the Commission with respect to any claimant. That is to say the Commission's determination of the amount of a claimant's loss, made after hearing claimant but without giving the foreign nation an opportunity to be heard or present evidence, is final for purposes of distributing any money ultimately received from a foreign government in lump-sum negotiated diplomatic settlements of the total claims of American nationals for property taken, and/or as a result of our Government having blocked the foreign funds located here. The reason for such a provision is obvious. The lump-sum payment of indemnification will be distributed pro rata among claimants in accordance with the amounts of their claims. Challenge by one claimant to the total dollar amount fixed for his claim would delay distribution of the settlement funds to all claimants, since ordinarily no distribution can be made until the total amount of outstanding claims has been adjudicated by the Foreign Claims Settlement Commission, so the percentage of recovery by all claimants can be determined. See, 95 Cong. Rec. 8854 (1949), which sets forth the Senate debate on 22 U.S.C. § 1623(h) as follows:

> "Mr. VORYS. The gentleman in his bill sets up a thing which approximates in some ways judicial procedure. Can the gentleman give this committee one single solitary

reason why he wants to deny claimants the right to go to court which this amendment would give him? Can the gentleman cite one reason?

Mr. RIBICOFF. Yes. The reason, as the gentleman may know, as we discussed it very thoroughly in committee, is that we are setting up here an expeditious handling of claims. We know that if you take these claims and get them involved in continuous court controversy, it will be many, many years before these claims are settled. You have a constitutional prohibition against courts interfering with settlements, and also you would have all these claims interminably tied up in court where one claimant with one appeal could tie up the settlement of 1,500 claims. We believe that three United States Commissioners would administer justice. In the final analysis, the main issue here is the amount involved, and the gentleman from Ohio well knows that any finding of fact based upon contradictory evidence would be conclusive upon a court anyway, and all that could be gained would be someone striking against the Commission and holding up

$17,000,000 worth of claims.
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Mr. JENSEN. Do I understand that this Commission has full authority to decide all these claims? In other words, are they a court of last resort?

Mr. RIBICOFF. They are, sir.

Mr. JENSEN. So whatever they decide, the claimants have no recourse to any other court of the land?

Mr. RIBICOFF. That is correct, sir.
***

Mr. VORYS. Mr. Chairman, I move to strike out the last word. Mr. Chairman, if the Committee will look at the majority report, you will see they make a lot of the fact that they are attempting to approximate judicial procedure in dividing up this $17,000,000 that belongs to the United States, among United States claimants. So there is not any question coming up except whether United States nationals have a right to this fund that belongs to the United States. This is the type of question which many of the claimants may not want to submit to the

final decision of these three bureaucrats appointed by the Secretary of State. For 10 long years, since I have been a Member of this House, we have heard a great deal of defense of the administrative agencies and commissions, that they should be given the right to make final decisions, so as to secure rapidity and flexibility. But we wiped that all out with the Logan-Walter law. We said, under the Act of Administrative Procedure, that these various boards and bureaus are going to be subject to review by the courts of the land. A man is not going to have to take the last word of some administrative bureaucrat. He is not going to have to know the right people in the Department. He is not going to be of the right political party or hire the right lawyer. He is going to have a chance to go into court if he disagrees, and an independent judiciary is going to decide what his rights are. But now, in this strange, anomalous thing that is brought here we are going to go back on the Logan-Walter law and say, 'Oh, no, no. All other boards, bureaus, and agencies around here must have some kind of

> court review, but not the State Department.' The fact that such review is possible has had a very beneficial effect on those agencies that exercise quasi-judicial functions. But when it comes to American nationals making a claim against their own Government for money which their Government has collected on their behalf from another country, you say, 'Oh, no. Your appeal is to the 'guys' who made the decision. These three bureaucrats. 'If you do not like it, you can lump it.'

Now, this amendment is simply to strike out that language in this bill and therefore leave it under the appellate procedure which the Congress, after years of debate and discussion and after consultation with all of these agencies, set up under the Administrative Procedure Act, providing for efficient and just court review for an American citizen. I hope the amendment is adopted."

After this discussion, the views of Senator Ribicoff prevailed.

Reported cases citing the statute go no further than to hold that challenges by claimants who question the amount of the loss certified by the Commission cannot be adjudicated in the district court. Zutich v. Gillilland, 254 F.2d 464 (6th Cir. 1958); American and European Agencies, Inc. v.

Gillilland, 247 F.2d 95 (D.C. Cir.), cert. denied, 355 U.S. 884 (1957); Haas v. Humphrey, 246 F.2d 682 (D.C. Cir.), cert. denied, 355 U.S. 854 (1957); DeVegvar v. Gillilland, 228 F.2d 640 (D.C. Cir. 1955), cert. denied, 350 U.S. 994 (1956). They do not stand for the proposition that the Foreign Claims Settlement Commission can adjudicate with finality a res inter alios, as Citibank apparently contends.

The Foreign Claims Settlement Commission itself contemplates that claimants may recover all or part of their losses in unrelated judicial proceedings, and such proceedings are not barred by the finality provisions of the Act. For example, in its determination of claims by Chase Manhattan Bank. Nos. 2684 and 2685, the proposed decision of August 4, 1971, No. CU-6294 (altered on a different ground in final decision No. CU-6295 of October 20, 1971), provided that any recovery by Chase in these lawsuits would be deducted from the amount of Chase's loss as certified by the Commission. The difference of course is that in these lawsuits Chase and Citibank have the chance of recovering in full, whereas claimants before the Foreign Claims Settlement Commission will likely recover only an uncertain percentage.

To hold that the Foreign Claims Settlement Commission's ex parte determination of the amount of Citibank's loss in Cuba is binding here against Bancec, or the Cuban Government, would violate a basic principle of our jurisprudence and would represent a denial of due process.

Accordingly, it would be inappropriate to apply such a finding as having binding effect in this litigation, and this is so wholly apart from the separate issue of whether an administrative determination ever has res judicata effect. See K. Davis, Administrative Law Treatise, § 18.01, et seq. (1958).

The Court will consider the decision of the Commission, but only as some evidence of the truth of the facts found therein, including the amount of value.

XIV

Computation of Damages of Chase

Chase's four Cuban branches were treated for bookkeeping purposes and convenience as a single so-called "Havana Branch" and will be referred to herein on occasion as a single branch. Chase has presented two separate theories, separately pleaded as separate counterclaims with respect to the confiscation of its Havana Branch. The first is referred to as the "separate entity" or "contract theory" of damages, and is based on the contention that the Havana Branch should be treated as a separate entity in the nature of a subsidiary corporation, whose relationship with the parent, defendant here, is that of debtor-creditor. Chase claims that the Havana Branch was indebted to its home office at the time of taking in the amount of $5,780,228, and that by virtue of Cuban law, specifically Resolution 2 of September 17, 1960, when plaintiff confiscated the branch, it assumed

all the debts of the Havana Branch; foreign and domestic, including its indebtedness to the home office.

The second counterclaim, sometimes referred to as the "single entity" or "conversion theory", is based on the contention that the Havana Branch and its assets were the property of Chase, and that Banco Nacional and the Government of Cuba converted that property, and defendant therefore is entitled to recover compensation for the conversion in the amount of the value of the assets, including going concern or "good will value" taken. This claim is asserted in the amount of $8,213,204.

For our purposes it matters little whether the claim is posited on the tort theory of conversion; or on the theory of an implied contract with Banco Nacional which received the expropriated property under circumstances which would lead to an agreement implied in law or in fact, or both to pay the fair value thereof, or if the claim be regarded as analogous to an action for reverse condemnation, or a claim under general principles of international law requiring full, fair and prompt payment for expropriated properties of aliens. In all events, one whose property is taken under the circumstances here present is by international law entitled to the full, fair and prompt recompense for all that is taken. Whichever theory of liability is applied leads to that same conclusion. The Court rejects plaintiff's demand that Chase make an election between or among any theories implicit in the case, or asserted by it at

trial. Treating its claim as in the nature of an action for conversion, regarding the branches as a single going business, Chase claims damages of $8,213,204, broken down as follows:

A.	Stated Capital	$4,000,000
	Less recovery applied against capital	391,000
		$3,609,000
B.	Unremitted profits	923,320
C.	Unearned discount	29,025
D.	Reserve for Taxes	170,448
E.	Contributions to retirement and thrift incentive plans	129,372
F.	Charged off loans	157,343
G.	Banking Houses and real estate appreciation over book value	189,767
H.	Going business value or good will	2,850,000
I.	Reimbursement to personnel for personal property abandoned on closing of branches	154,929
	TOTAL	$8,213,204

Plaintiff would compute the damages under this theory, assuming that they are recoverable, as $3,338,326. We note briefly the damage claimed under Chase's first counterclaim as an amount due from a separate economic entity, which was indebted to Chase's home office for various money invested in the branch by the home office, and the net sums owed the home office in other transactions. Under this theory, Chase argues that Banco Nacional assumed the liabilities of the branches, which it did with respect to the domestic liabilities, pursuant to Law No. 851, and that this

indebtedness totalled $5,780,228. Damages under the first counterclaim are itemized as follows:

A.	Capital Loan	$4,000,000
	Less recovery applied against capital	391,000
		$3,609,000
B.	Unremitted profits	923,320
C.	Unearned discount	29,025
D.	Reserve for Taxes	170,448
E.	Contributions to retirement and thrift incentive plans	129,372
F.	Charged off loans	157,343
G.	Overdraft in account with home office	94,515
H.	Payment of Letters of Credit by home office	667,205
	TOTAL	$5,780,228

As noted previously, plaintiff argues that Cuba did not assume the branches' external liabilities, and that a branch cannot be indebted legally to its home office, and even if such a debt is legally cognizable, the figures are computed incorrectly, and under plaintiff's theory, amount to only $370,720.

The financial effect of the first counterclaim differs from the second counterclaim only in that the overdraft, and payments on letters of credit are included, and the going business value and real estate appreciation items are left out. Chase filed separately before the Foreign Claims Settlement Commission for the confiscation of its Cuban branches under claims Nos. CU-2684 and CU-2685, decided together under a single final decision No. CU-6295 dated October 20, 1971. There the Foreign Claims Settlement Commission, when presented with these same

two alternate theories of valuation, found that:

> "Claimant [Chase] was the owner of the branches in Cuba and ... the claim should be predicated upon the ownership of the property taken, and not upon claimant's character as a creditor of its branches."

Accordingly, Claim No. CU-2684, based on the creditor or separate entity theory, was denied without further discussion. This Court agrees. The amount of "indebtedness" between the Cuban operation and the home office, with the exception of unremitted profits, which were a set aside fund, not necessary for use of the business and merely awaiting issuance of a currency control permit, is purely a matter of historical fortuity. The value of these accounting balances has no direct or logical relationship to the value of the property, or going business concern, taken, as of the time of the taking. What is significant, and all that was taken, is the value of the business and its assets, and the investment which had been produced as a result of incurring the indebtedness to the home office. Some of these assets had appreciated in value at the time of the taking, while others had diminished in value.

It is clear from the foregoing that Chase's damages should be based on the value of the taken business and its assets at the time and place of taking, a matter totally unrelated to the historical net indebtedness

of the branches to their home office. Accordingly, the Court will consider only the theory of the second counterclaim or single entity theory and will value the branches as a single going business located in Cuba, owned by Chase.

Plaintiff admits that the items for capital, unremitted profits and contributions to retirement and thrift incentive plans are fully justifiable figures. It disputes the validity of all of the other items of damages, and seeks a credit from defendant for additional charges or deductions against capital and/or recoveries.

In our consideration of the separate items, we are reminded that Chase and Citibank are both member banks of the Federal Reserve System and that Citibank is and was then a national bank. Chase was also a national bank from 1925 to 1955, and from 1965 to present. In the interim it was chartered by the State of New York.

It is a federal crime for anyone to make a false entry in any book, report or statement of a national bank or a member bank of the Federal Reserve System with intent to injure or defraud, or with intent to deceive any officer of the bank or the Comptroller of the Currency or a bank examiner. See 18 U.S.C. § 1005. There is a complex, long established, system of federal regulation in the United States whereby bank examiners, under the direction of the Comptroller of the Currency of the United States make surprise audits of banks such as Chase and Citibank, both with respect to their foreign and

domestic operations, audit their reports and examine their accounting practices. Drastic remedies are available to the Comptroller in the event of any falsification, or even negligent or inaccurate recordkeeping. These include the power to require that honest entries be made, and specifically the power to require that reserves be established whenever it shall appear that assets are worth less than the value stated per books. Besides the statutory requirement for making reports to the Comptroller under oath and the detailed provisions for audit, with civil and criminal penalties for non-compliance, the Comptroller has the further right and duty to publish his relevant findings. The totality of this statutory scheme has the tendency to assure that the books and records of institutions such as Chase and Citibank reflect current conditions accurately at all times. For state chartered banks, New York has a similar regulatory and bank examining bureaucracy which is generally regarded as at least equally strict and demanding.

Furthermore, Chase and Citibank operations in Cuba, in addition to reporting directly to the Comptroller of the Currency, as a part of the Bank's overall operations under comprehensive federal regulation in this country, were also subject to the bank examining powers of Banco Nacional, which had the power to require that the books of the Cuban operations be regularly kept in the regular course of business, and maintained in accordance with generally accepted accounting principles consistently applied, so as to give a true result of Cuban operations, for

protection of local governmental interests. The books of a national bank or a member bank of the Federal Reserve System present far less opportunity for "creative accounting" than that found in the ordinary domestic business. In view, particularly, of the double regulation present here, the entries may be treated as having evidentiary validity. This is appropriate especially where, as here, the passage of time and the present unavailability of local information in Cuba presented difficulties at the trial. The Court believes that having been regulated by the banking authorities both in the United States and in Cuba, the books and records of the bank may be regarded as correct and reliable, except to the extent actually impeached on the trial. See, F.R. Evid. Rules 803(6) and 803(8). We then turn to a separate discussion of each item:

A. Capital. The books and records support an allocation to the branch of $4,000,000 as capital, inclusive of reserves in the amount of $2,021,547.55. CDX 12, 16 and 17. It is undisputed that Chase recovered in 1969 on certain bonds of the International Bank for Reconstruction and Development. Although these bonds were physically located in Havana in 1960, and were seized by plaintiff or the Cuban Government, the bonds were registered in the name of Chase, and Chase was able to and did recover that credit. Thus the net capital account stands at $3,609,000. Banco Nacional seeks to reduce this figure by the further sum of $761,154, which represents the total of four loans made by the Cuban branches to Cuban companies, which were guaranteed as to payment by parent or related corporations in

the United States (the "U.S. Guarantors"). These loans were:

Obligor	Guaranty or Collateral
H.H. Pike Trading Co.	Guaranty of H.H. Pike & Co.
Remington Rand de Cuba, S.A.	Guaranty of Remington Rand Division of Sperry Rand Corp.
General Motors Acceptance Corp. of South America	Guaranty of General Motors Acceptance Corp.
Pfizer Corp.	Guaranty of Chas. Pfizer & Co., Inc.

The parent or guarantor corporations were all solvent in 1960, and present in the United States where they were amenable to civil process, and have remained so throughout the period. Plaintiff argues that these four loans were clearly recoverable by Chase from the U. S. guarantors, and although Chase never collected from them, the loans should not be charged to plaintiff, but Chase should be treated as having received a constructive recovery, which would diminish the amount of its capital account.

This argument is rejected. The statutory scheme by which Banco Nacional or the Republic of Cuba seized all of Chase's banking operations in Cuba included assumption by Banco Nacional of all deposits and all local banking assets including the claims against these four obligors which were

present in Cuba or domiciled there. Banco Nacional, by the seizure, was enabled and entitled to collect against the obligor businesses in Cuba which owed money to the branch or from any interventors or successors in interest owning those businesses. This Court assumes it did so in absence of evidence to the contrary. Chase had no records as to balances owing after September 17, 1960. It did not possess the notes or accounts of the principal obligors after that date. It would be inequitable for plaintiff to prevail here on this contention when it was the seizure of Chase's property in Cuba which prevented the Bank from access to the necessary instruments and records to assert the claim against the guarantors had it decided to do so, and when Banco Nacional was in a position as Chase's successor under Cuban law to pursue the Cuban obligors. In addition, no duty is found in law or in equity which requires Chase to look to the guarantors rather than to the convertor of the underlying guaranteed obligations of the Cuban borrowers. I hold and conclude that Chase is not to be charged with constructive recovery of the four guaranteed loans. All contentions to the contrary are rejected.

Plaintiff would also charge Chase with a separate reduction in item A for unrecorded depreciation in the market value of investment securities held by the branch. It argues that the market value of the branches' investment portfolio had decreased substantially from book value by the date of nationalization, and this depreciation must be taken into account in the valuation

process. It is noteworthy that the regulatory authority in Cuba prior to confiscation did not require any writedown in the investment portfolio, a practice ordinarily insisted upon by those who regulate banks. Determination now of the actual market value of these securities on the date of nationalization is extremely difficult. Like most banks, Chase normally valued its securities at cost, unless there was a regulatory objection to a particular asset, or an indication of a permanent impairment in value, in which case the value would be reduced to a lower figure. As of June 30, 1960, the branch had taken a customary write-down of some of the securities.

Stephen P. Radics, a Certified Public Accountant, testified for plaintiff as an expert based upon his prior service rendered to regulatory authorities in the field of banking and insurance with respect to the valuation of securities. Radics testified to valuations he had made of securities carried on the books of Chase's Havana branch. Radics seized upon what he perceived as an inconsistency in Chase's own valuation of some of its securities. As of June 30, 1960 the branch had taken a customary write-down in market value of some of its securities, carrying some of them at 80% of value, and others at 93%. Radics concluded that on the basis of the branch's own valuation of some of its securities, others of like maturity and coupon should likewise be written down in the name of consistency. He testified, for example, that the Social and Economic Development

Bonds of the Republic of Cuba, 4%, due 1956-58, payable in dollars, should have been written down by 20% since a similar issue payable in pesos had been so written down by Chase, and under local currency regulations, a resident of Cuba holding such bonds would be required to receive payment exclusively in pesos. He also criticized carrying Cuban electric bonds at cost, because "I assumed that this would be at the approximate same 93% in value as the Tribunal Bonds because they had like maturity and the interest rate was very close." (Tr. p. 283). He reached the same conclusion as to the Marianao Aqueduct Bonds.

In the witness's own language, his testimony was "an assumption." (Tr. p. 284). His testimony continued to make similar assumptions, namely that because some bonds had been written down prior to the confiscation of the branch, other like bonds should have been written down. These assumptions by Radics, made long after the fact, do not, in this Court's opinion, justify or substantiate the adjustments claimed. His testimony is not entitled to sufficient weight to rebut the inference of regularity, which applies to the books and records of the branch, kept as noted before, in the regular course of business by Chase, under the close supervision of regulatory authorities, both American and Cuban. Based on his assumptions, Radics claimed a write-down of $617,070. This Court regards the necessity for any such write-down as not proven, and speculative at best. To the extent that Cuban bonds were taken over and held by Banco Nacional as a part of the

confiscation, there is no reason to believe that the bonds were not paid at face to Banco Nacional in due course of their respective maturities.

Many of these securities were issued by Cuban government entities, and banks were required to purchase them in order to remain eligible for Government deposits. Radics relied on June 30th market values, and submitted no valuations as of the date of the taking. While market values on the date of the taking may well have been lower, in view of deteriorated conditions in Cuba, as noted before, the branch properly valued its securities at cost, absent a permanent impairment in value. No such permanent impairment was shown beyond the branch's voluntary reduction of certain securities in presumed compliance with regulatory standards, not applied to others, in June of 1960, prior to expropriation. The speculative testimony of Radics that the values recorded on Chase's books were above the permanent value of the investments is insufficient, and the Court will accept Chase's valuation of its investments to the extent of finding that there is no impairment of the branch's capital by reason of any security over valuation.

A further problem is presented with respect to the capital account item. Chase has proved that on the date of the taking there was an "overdraft" in its account with the home office, amounting to $94,515. Such overdrafts were a regular consequence of the bookkeeping procedures between the Cuban offices, consolidated for recordkeeping

purposes at the Havana branch, and thereafter posted, as operating results of a separate economic enterprise, to the records of the home office in New York. Between 1925 and 1937 the entire working capital of the Chase Cuban operation was supplied in the form of an overdraft. From time to time since 1937 such overdrafts were cancelled out by assignment and delivery of additional allocated capital to Havana, usually in the form of bonds or other securities, but sometimes by remitting dollars. Not only from an accounting point of view but in economic reality, the creation of this overdraft and prior negative balances had the same effect as the further contribution of capital to the Havana branch. In effect, the head Cuban branch in Havana was permitted to overdraw its checking account in dollars with the main office, so that the reflection on the books of the main office in New York would be a negative balance in the Havana branch checking account. This appears from the deposition of Michael P. Esposito, Jr., taken April 10, 1974, Ex. G. There is no reason why the overdraft amount should not be treated as a part of the capital account, for our purposes indistinguishable therefrom in fact or law.

There is also involved with the capital account the additional sum of $667,205 for payments made after September 17, 1960 by the home office to beneficiaries of some 203 separate international letters of credit lawfully issued by the branch for Cuban enterprises (customers of the branch) payable in dollars in New York. Chase received no reimbursement from the branch or

from Banco Nacional. See DX 1 and Agemian Affidavit, docketed May 26, 1961.

The practical effect of these letters of credit transactions may be summarized in one of two ways: (1) these payments may be regarded as additional contributions to capital of the Cuban branches, or additional investment therein; or (2) they may be regarded as countervailing entries to loans made to, or money received or to be received from customers in Cuba by the Cuban branches either before or after September 17, 1960. If the latter analysis is pursued, the Court will infer that Banco Nacional, as the successor in interest of the domestic banking businesses of Chase's branch, received the monies paid or to be paid by the customer in pesos for these letters of credit. Expressed differently, as a result of the seizure, Banco Nacional became the successor in interest of Chase with respect to the loans extended or promised to the Cuban customers or purchasers of these letters of credit. As a result Banco Nacional became entitled to collect the avails of the customers' side of the letter of credit transaction in pesos in Cuba, while Chase, in New York was required to and did pay the beneficiary's side of the transaction in New York in dollars, in the total amount set forth above. Thereby, Banco Nacional became obligated in quasicontract to pay Chase for having accepted the burdens of these transactions, inasmuch as it had derived the benefit.

While the latter analysis would seem to be justified against the background of ordinary international banking practice, the situation in fact is that had there been no seizure of the branches, when the beneficiaries of the letters of credit were paid in New York in dollars, the amount so paid would have been booked as an addition to the overdraft for the Cuban branch, and carried in that fashion until a currency exchange permit was issued to allow remittance to the home office, or countervailing international transactions resulting in charges to New York and credits to Havana wiped out the overdraft. Overdrafts, as noted, represent part of the capital of the branch. A firm commitment to create an overdraft is no different from one already booked. The Court prefers the first analysis, and believes that these payments should be treated as a part of the capital investment of Chase in the Cuban branches, because Chase had obligated itself in that amount to be added to the overdraft the moment that the letters were issued. By permitting them to be issued, Chase was in effect, by that act alone, contributing capital or placing funds at the disposition of its Cuban operations indefinitely. But, whether treated as part of the capital investment of Chase in the Cuban branches, or alternatively, as a quasi-contractual obligation of Banco Nacional, the sums due on these letters of credit are a proper item for set-off in the case. We note that in the hypothetical valuation of the Cuban branches upon an arm's length sale to a purchaser intending, as Banco Nacional did

here, to carry on the business of the branches, these sums would represent current items to be adjusted in favor of the seller at a closing of the sale, since the purchaser (Banco Nacional) became vested with the right to collect from the customers, while Chase remained liable to pay the beneficiaries.

The Court will add the sum of $94,515 for the overdraft, and the further sum of $667,205 for the letters of credit paid to beneficiaries after the taking to the net recovery under Item A for capital, which is accordingly fixed at $4,370,720.

B. Unremitted Profits. Plaintiff does not dispute defendant's computation for $923,320 in unremitted profits of the Cuban branch. This money would have been remitted to the home office but for want of a currency control permit. Chase had applied for the permit, which at the time of the taking, had neither been granted nor denied.

C. Unearned Discount. This item represents prepaid interest by borrowers which was not earned by the Bank as of the date of the taking, but which would be accrued and earned over the balance of the loans outstanding. Unearned discount, until earned, cannot be considered an asset of the branches. Should any of the loans be prepaid, it would be necessary to refund all or part of the unearned discount. The branch carried this as a reserve item on its own books of account, and when Banco Nacional took over the day-to-day operations of the Chase branches, I infer that it must

have granted credit or benefit to any domestic borrowers who prepaid, and that its earnings in the subsequent accounting period were reduced in like amount. Recovery on this item accordingly must be denied, since it is a reserve item for which Banco Nacional, or any purchaser of an ongoing banking concern would be deemed to have paid simply as a part of assuming the business and acquiring the right to the flow of future earnings after the transfer of ownership. This is the sort of accounting item which leads to a closing adjustment in favor of the buyer when a banking enterprise changes hands as a result of an arm's length sale.

D. Reserve for Taxes. This item represents an accrual of the taxes owed by the branches to Cuba on local earnings for the first eight months of 1960, which would be payable at the end of the year. It is taxes incurred for previous operations, but unpaid, rather than a reserve for taxes not yet accrued. Nor is it a prepayment of future taxes. Chase argues that once the branch was expropriated the money was freed from its status as a reserve, since "the Cuban Government would not pay taxes to itself." This argument misses the point. The reserve account represented taxes on profits which had already been made. These taxes were owed to the Government for operations through August of 1960, even if they need not be paid until the end of the year. Although the branch may have been in possession of the assets represented by this account on hand in September 1960, this amount was already committed to the tax payment which Chase would have to make at the end of the year. The particular taxes due in the

corresponding amount are to be regarded as paid and this sum shall be eliminated from the computation of the assets to be paid for. The same result would follow in negotiation of the theoretical arm's length sale of the branch to another bank, that is, here again, this item would represent an accounting adjustment in favor of the buyer at a closing.

E. Contribution to Retirement and Thrift Incentive Plans. This account was for money paid to trustees of the plans by the home office on behalf of the branch. Its validity is clear and is conceded.

F. Charged Off Loans. This item represents losses arising from uncollectible loans, so regarded, made by the branch prior to confiscation. Sometimes such charged off loans are collected later, but in effect such an account is a reserve for bad debts, based on the best estimate of the managers of the branches as of the date that the reserve was booked. Like the rest of the accounting entries of this regulated industry, the book entries carry a presumption of regularity, having been made prior to litigation. There is no evidence that these reserves were calculated in any fashion other than properly, or that the charged off loans had any value. For those reasons this item of damage is disallowed. While Banco Nacional succeeded to the ownership of the charged off loans, there is no evidence that it collected any of them, nor if so, what amount of charged off loans was collected. The item is worthless.

G. Banking House and Real Estate Appreciation. On its books (DX 12) Chase listed its real estate holdings at a depreciated cost of $110,232. The latest available appraisal of any of the branches was made on March 28, 1960 and applies only to the Havana office (DX 13). This values the premises owned by Chase at $165,090, and the necessary adjustment to bring the book value for that property to market would be $54,858. The Court regards the appraisal, which was made prior to the commencement of any litigation, as valid, and is convinced that the premises did have a value in excess of book value. There is no evidentiary basis to write up any of the other items comprising the banking house and real estate account beyond that shown on the corporate books.

I. Reimbursement of personnel. It would have been a crime, in Cuba, for any branch employees not to have cooperated fully with their new employer, Banco Nacional, or to have impeded the takeover of the Chase branches in any fashion. In view of the sensitive circumstances surrounding the nationalization, Chase in effect advised, or it is now said, "directed" a number of the branches' employees both North American and Cuban, to leave Cuba. In their hurried departure, these persons left behind personal property, which they could not bring into the United States, either because of the shortness of time or the inability to obtain permission to export it. Under Law No. 989, all property of persons fleeing from Cuba was confiscated.

Chase paid the sum of $154,929 to its employees, and this represents the reasonable value of the property left behind and confiscated by Cuba. The employees made formal representations to their employer of the items taken and the reasonable value, and did so under conditions having intrinsic indicia of reliability, and conducive to truthful statement. The Court regards these claims as received in the regular course of business of the Bank, and acted upon and paid by the Bank to the employees prior to this litigation. After this litigations was commenced, or in contemplation of claims against the Cuban Government, Chase caused its employees to "assign" all these claims to Chase, and now asserts that it is entitled to include this amount in its recovery. There is a good basis for denying this aspect of the claim. The entitlement to set-off found in Banco I, supra, should not be regarded to embrace counterclaims or set-offs originally belonging to a third party and acquired by a defendant in anticipation of litigation, or after it has been sued by a foreign state, and in order to set-off. To hold otherwise would call up a brisk trade in claims against foreign states, and would in effect nullify the Act of State doctrine, and prevent access by the Government of Cuba to the United States courts against any United States defendant having the willingness and creativity to buy up Cuban claims of others to assert as assignee. This case is not one where Chase went out shopping for claims to assert against plaintiff, but we cannot allow a result here which would permit that to be done in the next case. Here, the assignors of the claims had a special relationship to Chase, and indeed Chase had a

moral obligation, and perhaps a legal one [Cohn v. Lionel Corp., 21 N.Y. 2d 559, 563 (1968)], to reimburse them for their losses, and did so. However, the Court concludes that this is not a proper item for recovery by way of set-off. The set-off extends to Chase's property expropriated by Cuba, and not the property of others expropriated, even when such assignments were given to Chase for a proper purpose and for full value paid. This item is disallowed.

H. Going Business Value, or Good Will. In its presentation Chase has used the expression "going business value." Reference has also been made to the "good will" value of the Chase branches. These words do not necessarily have the same meaning to this Court. The going business value is that price which a knowledgeable purchaser, trading with a seller at arms length, neither party under any compulsion and each fully informed, will pay for the right to continue a going business, and to receive the income stream or cash flow which that business will generate for the foreseeable future. Included in that payment, however, is the transfer to the purchaser of those physical assets and capital which are essential in order to continue to operate the business in the manner in which it has been operated. Here, Chase's financial statement contained items such as unremitted profits, which would have been repatriated had currency control conditions permitted and were not necessary to continued operations. However, most of the balance of Chase's capital account and physical assets were necessary to be owned by any person or corporation operating the Cuban branches.

Good will, on the other hand, is the pure dollar value of the right to receive the stream of income after the necessary capital has been invested to enable the purchaser to continue in the business. It is the "premium" which the purchaser of a profitable business pays, over and above the value of the tangible components necessary to operation of the business.

Radics testified (Tr. p. 296) that "going business value is something separate and apart from any other measure of value for any business enterprise, including a bank," and that in the case of the valuation of a bank, "a premium for extraordinary earning power would normally only come into play if the going business value as separately determined, resulted in a greater figure than the net assets of the bank itself." His nomenclature is appropriate. Radics gave the opinion that such separate determination would not result in a greater figure in the case of Chase, but testified that in all events it would be improper to calculate going business value and add it to the fair market value of the assets. Rather, in valuation he would use the greater of the two figures; that being the value of the bank. Any amount by which the going business value of the bank exceeds the asset value is referred to as a premium.

Radics also contended that the home office had advanced working capital to the branch. The Court assumes that the home office, acting in the regular course of business, placed its capital where it would be most productive, as indeed any business enterprise would do. The record

shows that upon providing capital of $4,000,000 and adequate banking premises from which business could be conducted, Chase would have been and was able to produce the stream of earnings. Radics' contention that if application to the earnings stream of a price-earnings multiple results in a lower figure than the asset value, there is no premium or good will value, although valid facially, must be based on an analysis considering the minimum necessary capital investment. Here, Chase had excess assets at risk in Cuba. With its stated capital of $4,000,000 and its real estate appreciation, Item G, amounting to $54,858, Chase could operate the Cuban branches. This sum, $4,054,858 is the necessary net capital investment. Any amount by which the going concern value of the enterprise exceeded that sum represents good will, or the premium which the hypothetical arm's length purchaser will pay to acquire the stream of earnings.

We consider now the proof as to the value of the stream of earnings.

Charles Agemian, a former Executive Vice President and Comptroller General of Chase had served 43 years with the Bank, and participated in all its acquisitions. He testified as to the going concern value. Agemian arrived at the $2,850,000 figure, Item H, supra, by averaging two estimates for going business value, each reached by different methods. The first method was based on a percentage of deposits, the other on a multiple of earnings. The Court believes that there is no logical basis to add the result of these two methods,

and divide by two. Rather, we must test the logic and reason of each method, and determine whether either one leads to an apparently rational result.

Chase also introduced a report prepared in 1974 by Thomas H. Barton and Co., Inc. a management consulting firm (the "Barton Report" DX 15). This Report calculated a going business value premium of $2.5 to $3 million dollars for the branches, based on expected deposit and earnings growth. The Report estimated that the branch might have been sold in the fall of 1960 for $7.5 million. Those projections were based on the assumption that "normal business patterns" in Cuba had not been interrupted as of January 1, 1959. The Barton Report did not attempt to assess the impact of the Cuban Revolution on the branches' value, but valued the branch as if the Revolution and succeeding events had never occurred. Actual figures for 1959 and part of 1960 show that the Barton Report's "projections" were far removed from the reality of actual deposits of the branches.

The Barton Report made comparisons with banks in other areas to determine a range of price-earnings multiples, profit growth rates, deposit growth rates and other figures in order to calculate the value of Chase's Cuban branches. Banks in Honduras, the Virgin Islands and other areas were studied. In addition, the Barton Report compared the Cuban branches with banks in Puerto Rico and Panama having many conditions in common with Cuba. The author believed the experience in those countries

would give an accurate picture of the probable range of growth of the Cuban branches "Had [they] been allowed to develop without interference." The validity of all the comparisons undertaken by the Barton Report, including the calculation of a premium for going business value, is extremely questionable because, as noted, it does not allow for circumstances actually existing in Cuba in 1960 unrelated to confiscation.

Agemian, in his calculations, took an annual deposit figure of $45.5 million, representing the average of the past five years of deposits. He multiplied this by 5% to come up with $2.25 million as the going concern value based on a multiple of deposits. The difficulty lies with the use of a five year average. These figures are:

Year	Average Deposits (in millions of dollars)
1956	46.2
1957	49.1
1958	51.8
1959	42.6
1960 (part)	38.0

These figures show that the deposits declined sharply after the Revolution in 1959, and as previously noted, a substantial part of that decline does not result from any violation of international law. A reasonable approach to valuation would select a "normal" current deposit average figure in-between the 1959-1960 deposits. There is reason to believe that the 1960 deposits reflected the deteriorating conditions, and that prior to the actual taking, the intention to drive out

the foreign bankers must have been obvious to a section of the customer public. Those factors which reduced deposits, but which were lawful, had not in 1959 achieved their fullest impact. The Court believes a figure of $40,760,000 represents the weighted average deposits for 1959-1960 of the Bank, and is close to what deposits would have remained if the Cuban Government had been content to make those secular changes short of confiscation which this Court finds to be lawful but adverse in their effect upon the Bank. Using that figure, Agemian's deposit percentage calculation would have yielded a premium figure of $2,038,000.

Agemian derived the 5% multiple used by averaging the multiples used in four acquisitions by Chase of banks in Staten Island (4.62%); the Clinton section of Manhattan (4.03%); the Virgin Islands (8.13%); and Honduras (5.55%). Agemian took the average of these figures which is about 5.5% and reduced it to 5% to be conservative.

The use in the valuation formula of premium prices paid for branches on Staten Island, New York and in the Clinton section of Manhattan tended to reduce the multiple because New York City generally is fairly saturated with branch banks, and the banking business here is and has been highly competitive. The Virgin Islands location was favored by the availability of the due process provisions of the American Constitution. It is an area of free dollar convertibility, enjoying special tax concessions not available in the continental United States, and is without currency controls. Banking there was not threatened

with political problems of the severity present in Cuba after the Revolution. The Honduras bank, selling at a 5.55% multiple, probably reflects a better political and economic environment than that available in Cuba, but not as favorable as Manhattan. Generally, the greater the risk the larger the return demanded by investors, and the more a bank can charge when it lends out its deposits.

The other half of Agemian's calculations were based on a multiple of average yearly earnings. In the period 19561960, Chase's reported earnings averaged $344,000. Agemian multiplied this sum by 10 to arrive at a going business value of $3,440,000. He averaged this with the $2.25 million figure based on deposits to reach a total of $2.85 million dollars.

This aspect of Agemian's calculations is subject to the same infirmity, in that it averages in less relevant earnings of preevolutionary years. Also, little justification appears in the record to use a multiplier of ten times earnings. Ordinarily, a speculative investment where the likelihood of future success is clouded by ongoing social changes of the sort there present would demand a lower multiplier in an arm's length transaction, because the purchaser cannot foresee for how long he may have assurance of the stream of earnings which he is purchasing.

Under the facts of this case, the net value of the business assets needed to operate the enterprise exceeds ten times the stream of earnings. In addition, the

historical earnings of the branch in 1959 and 1960 may be distorted because of imputed interest, which should have been charged against the profits of the branch, for funds of the home office which were tied up in financing its ordinary transactions because of inability to rediscount with Banco Nacional, and/or because of foreign exchange restrictions. In any event, under Agemian's own figures, if the stream of earnings were priced at ten times the average earnings for the last five years, the total amount resulting therefrom, $3,440,000, is less than the value of the physical assets necessary to devote to the business of banking in order to receive that stream of earnings. This is totally irrational, and suggests that the method is unworthy of consideration. The Court regards the second half of Agemian's calculations as entitled to no weight.

Agemian offered a third calculation based on straight capitalization of earnings as confirmation of his $2.85 million figure (Tr. pp. 111-12). That sum, $2.88 million, came from a calculation of average earnings using a multiple of 20. This multiple was derived from the four acquisitions previously mentioned, at Staten Island (16 x E); Clinton (22 x E); Virgin Islands (27 x E); and Honduras (14 x E), described above. Multiplying average earnings by this multiple of 20 gives a figure of $6,880,000 which, rather than a premium to be added to net asset value, is a total figure which includes within it the value of the assets necessary to operation of the business. Agemian therefore deducted a net asset value of four million dollars from the capitalization

The $4,000,000 deduction was too low since in addition to the capital and reserves required to sustain its deposits, the Bank would have to use the real estate Item G. The deductible, as noted earlier, should be $4,054,858, leading to a good will value under this method of $2,825,042. The multiplier of 20 seems inappropriately high. The Court can place no weight on this mathematical exercise.

In this valuation issue, the Court must adopt a method of determining going concern value which is justified by the evidence and reasonable under all of the circumstances. Most of the traditional techniques for computing going concern value of a business are inappropriate or unworkable here, or require the Court to assume facts, and consider future expectations present in most market valuation circumstances, but not available in this case. Past earnings of a business are usually a good basis for valuation in the manner used by Agemian, by capitalization of earnings. But the validity of any appraisal based on past earnings requires a demonstrated underlying validity for the future of both elements of such a calculation: the figure used as a multiple, and the average earnings sum itself. Neither can be justified. The invalidity of the past historical earnings prior to 1959 as bearing on future earnings is apparent from the secular change occurring in Cuba beginning with the Revolution.

The branches were a declining business in 1959 and 1960, although the earnings of its Cuban branches are as follows (stated without any adjustment for imputed

earnings of its Cuban branches are as follows (stated without any adjustment for imputed interest in the last two periods):

Year	Average Earnings
1956	$171,326.70
1957	119,208.02
1958	361,973.10
1959	492,560.02
1960 (eight months)	448,388.85

As the court noted in United States v. Brooklyn Union Gas, 168 F.2d 391, 396 (2d Cir. 1948):

> "Care is taken to reject speculative values. Thus the oversimplification of a capitalization of future earnings of the franchise is not resorted to since it must be based upon too many uncertain premises, such as the continuance of the franchise and of the present return therefrom over an indefinite period in the future."

We return to the primary readily available measure of the going business value of the Cuban branches, which should be based on a percentage of the deposits, since deposits are the source of earnings of a bank, and probably the most direct indicator of its future earnings. As noted, Agemian used a five year average, but the deposits were trending downward, due to the secular changes in Cuba. It seems that rather than a five year average, an average based solely on the experiences in 1959 and 1960 would have greater weight. Also, Agemian's multiple of

5% of deposits is a high multiplier for a branch located in Cuba. The late Judge Bryan considered the percentage figure which should be applied to the deposits and set forth the following information in his notes:

> "The defendant's own report, The Barton Report, quotes Arthur Dewing, The Financial Policy of Corporations, at pp. 312-313 as saying that the percentage figure applied to deposits of a bank to figure going concern value ranges from 1% to 5%. Under the circumstances here, I would apply a 3.5% figure. I readily admit that this number is selected quite arbitrarily, but my choice is based, as it must be, on my own assessment of the situation, as it has been presented to me by the parties."

This Court can find no better way of determining an appropriate multiple for deposits. Judge Bryan's admittedly arbitrary selection, based as it was upon his familiarity over many years of consideration of the matter, while not binding on the writer, is entitled to some consideration.

Interestingly, Decision No. CU-6295 of the Foreign Claims Settlement Commission, dated October 20, 1971, which fixed the value of Chase's claims, contains the following finding:

> "...e Commission ... does not approve claimant's formula for the determination of the 'going concern value' of the branches, but finds

> that in countries such as Cuba an amount of 3-1/2% of the average deposits during the last five years sufficiently reflects the premium the bank might have received had [Chase] decided to sell the branches or to consolidate them with another bank. Accordingly, 3-1/2% of $45,500,000, the average sum of deposits during the last five years before nationalization, or $1,592,500 will be added to the sum heretofore determined in the Proposed Decision as the loss sustained by [Chase]."

In its proceedings before the Foreign Claims Settlement Commission, Chase had argued for a "going concern value" (actually, "goodwill") to be added to the value of the tangible assets, and "determined on the basis of one-half the sum of 5% of the average deposits during the last five years plus ten times the average net profits for the last five years."

This Court finds that reliance on use of any such formula and consideration of the price earnings multiples as applied to Cuban operations after January 1, 1959 would be inappropriate, as it is lacking in probative force. Also, while the decision of the Foreign Claims Settlement Commission is admissible and entitled to some weight [F.R.Evid. Rule 803.(8)(C)] this Court cannot agree that pre-1959 deposits have any significant relationship to 1960 valuations.

Applied to a weighted average deposit figure considering only 1959 and 1960, the 3-1/2% computation would produce a premium figure of $1,426,600, which is

3-1/2% of $40,760,000, which should be included in the value of the branches over and above its net asset value. This compares with the sum of $1,592,500 reached by the Foreign Claims Settlement Commission, using a five year deposit average.

This leads to an award of damages to Chase for the taking of its Cuban branches in the amount of $6,904,870, to which amount Chase is entitled as a set-off. This total comprises the following items:

A.	Capital, net of adjustments	$4,370,720
B.	Unremitted Profits	923,320
E.	Contributions to Retirement and Thrift Incentive Plans	129,372
G.	Banking Houses and Real Estate Appreciation Over Book Value	54,858
H.	Premium or Goodwill	1,426,600
TOTAL		$6,904,870

XV

Currency Convertibility

This Court has computed the set-off in dollars, and plaintiff's claim has been stated in dollars. Plaintiff urges that any judgment granted on the counterclaims should be treated as a judgment in pesos, which must

be converted into United States dollars at the time of the granting of such judgment. In this particular litigation, the date of granting of the judgment will be of no practical consequence, since both sides of this litigation foresee several years of appellate review in which new battles will be fought, and old ones renewed. Such conversion is sought pursuant to cases such as Die Deutsche Bank v. Humphrey, 272 U.S. 517 (1926) and its progeny, including Conte v. Flota Mercante Del Estado, 277 F.2d 664 (2d Cir. 1960) and Island Territory of Curacao v. Solitron Devices, 356 F.Supp. 1 (S.D.N.Y. 1973).

Cuban pesos are currently without value in the United States, and it is now illegal to convert pesos into dollars. 31 C.F.R. § 515. The customary rule requiring conversion as of the day of judgment was intended to prevent abuse in a situation where a claimant could gain by bringing suit on a claim arising in the foreign country and payable in its currency, in an American court rather than in a foreign court. Conversion into dollars at the date of judgment was supposed to result in a recovery equal to that which would have been obtained in the foreign jurisdiction on the same date. The danger of a kind of forum shopping to seek the jurisdiction which would award the greatest amount of damages is not present here, and to require a conversion on a date not related to reality would create an obvious injustice under the circumstances of this case. As a matter of law, defendant is entitled to a prompt and full compensation, and this notion comprises convertibility.

The damages found are based on the official rate of exchange at par prevailing at the time of the confiscation.

Plaintiff also urges that to allow set-offs, in dollars, to defendants on their counterclaims against plaintiff's recovery in dollars, would enable a circumvention of Cuba's currency control regulations which prohibit unlicensed conversion of pesos to dollars and the transfer of money from Cuba to the United States. Implicit in the argument is the suggestion that the duty to pay for the confiscated property arises in Cuba and may be discharged in pesos. The identical argument was rejected in Menendez v. Saks & Co., 485 F.2d 1355, 1365 (2d Cir. 1973), rev'd. on other grounds, sub nom., Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976), and is rejected here on the same reasoning. See also the opinion of the late Judge Bryan in the Menendez case, reported sub nom. Menendez v. Faber, Coe & Gregg, Inc., 345 F. Supp. 527, 540 (S.D.N.Y. 1972). Convertibility free of unreasonably restrictive foreign exchange controls seems also to be implicit in the concept of "prompt, adequate and effective" compensation for the expropriated property of aliens. See § 190, Restatement Second, Foreign Relations Law, and discussion following that section. Here, as the court held in Menendez, fn. 12 at p. 1365 of 485 F.2d, "if the owners had been awarded pesos rather than dollars, in effect they would have recovered nothing."

XVI

Computation of Damages of Citibank

The factual and legal situation with respect to the damages of Citibank for the taking of its branches differs little from that with respect to Chase's set-off. Citibank states a single claim representing an aggregate of items. These are:

1. The value of the Cuban branches:

   (a) appraised on a "going concern" basis; $9,510,000.00

   OR

   (b) appraised on a "net worth" basis $5,961,037.00

2. Post-nationalization payment of Cuban branch liabilities $ 809,641.00

3. Claims of employees to which Citibank is subrogated as assignee $39,491.00

We consider the third item first because it is simple. As Chase did, and for the same reasons, Citibank "directed" its employees to abjure the realm, consequent on nationalization, and they did so. Like the employees of Chase, Citibank's people abandoned their homes and personal property, which, under Cuban law, became vested in the Cuban Government. Citibank reimbursed these

employees in the total amount of $39,491. Such payments were made in the regular course of business, prior to the commencement of litigation, arguably pursuant to the duty which a principal has to indemnify its agent. These payments are confirmed by the regularly kept books and records of Citibank.

This item is disallowed as an item of damages available for purposes of setoff. This result follows solely for the same reasons that payments of an identical nature made by Chase for its employees who fled Cuba following nationalization have been disallowed, see supra, p. 99, et seq.

The second item of damage arose under factual circumstances indistinguishable from those which occurred with respect to Chase, discussed supra, p. 93, et seq. The head office of Citibank confirmed approximately $721,000 in commercial letters of credit for the accounts of customers of the Cuban branches prior to September 16, 1960. Once the credits were confirmed, the head office was obliged to make payments to the beneficiaries of these letters of credit in dollars, and did so. The bookkeeping procedures followed by Citibank were the same as those generally used by Chase. The Cuban Government (Banco Nacional) as the owner of Citibank's Cuban branch, became the owner of the loans payable, or money paid or to be paid in pesos, by the Cuban Citibank customers at whose request the letters of credit had been issued. This item is clearly a proper set-off for the same reasons that an identical set-off is being allowed with respect to Chase. In addition, the head

office paid customers with respect to items forwarded to Cuba for collection, and in respect of money transfers executed at the instance of the Cuban branches, consisting of bills drawn by customers, or correspondent banks of Citibank, on obligors in Cuba. These instruments were in the process of presentation and collection by the Cuban branches at the time of confiscation. The Cuban Government (Banco Nacional) succeeded to the ownership and possession of these instruments after confiscation, and received the benefits of them, while Citibank paid the corresponding amounts due to the customers. On principles of quasi-contract, and for the same reasons generally applicable to the letters of credit, this item is a proper recovery. Together, the items for collection and the payments made to the beneficiaries of the letters of credit are a proper basis for set-off in the total amount of $809,641.

Judge Bryan's bench notes indicate that Citibank has already recovered towards its set-off the sum of $5,302,032. This recovery includes the following:

U.S. Treasury Bonds in registered form, which Citibank reported as stolen and obtained reissuance from the U.S. Treasury	$3,000,000.00
Accrued interest on bonds at time of confiscation	38,111.00
Set-off recovered in Banco I	2,100,000.00

Private banks set-off	54,624.00
Miscellaneous home office recoveries	109,297.00
TOTAL	$5,302,032.00

There is also a valid book entry in favor of the Cuban branches (the reverse of an overdraft) due at the time of nationalization from the head office to the Cuban branches in the amount of $762,898.

This leads to a total of $6,064,930.00 already recovered.

This Court has sustained Item 2 of the set-off in the amount of $809,641. Since Citibank can obtain no affirmative recovery in this litigation, in order to set-off fully against the amount of $193,280.30 due Bancec, all that Citibank need show is that its damages from the taking of the branches including good will are at least $5,448,569.30.

In the proceedings which Citibank conducted before the Foreign Claims Settlement Commission a final decision was entered on November 14, 1969 under No. CU-3835. These findings, which are not binding on the Court but which are clearly relevant and have some evidentiary value under Rule 803(8)(a) and (c), F.R.Evid., fixed an aggregate value of Citibank's eleven Cuban branches on September 17, 1960 at $9,510,000. In this trial, Citibank contended for a higher figure.

The August 23, 1960 statement of Citibank showed the net asset value of the

Cuban branches to be $5,961,037.41. To this Citibank sought to add a write-up for the increase of market value over book value of land, building and contents, amounting to $1,700,000.

Based on a review of the entire trial record, the Court is convinced that the books and records of Citibank's Cuban operations, regulated by authorities both American and Cuban, were, like those of Chase, regularly kept in a manner that was substantially correct and in accordance with law. Those books reflected the operations of the Cuban branches in accordance with generally accepted accounting principles consistently applied. The Court is also certain that there was some significant unrealized appreciation in excess of historical depreciated cost with respect to the real estate. The Court believes also that these branches had a good will value in excess of the total value of the assets necessarily devoted thereto. If Citibank's damages were to be computed in the same manner and on the same or similar theories of valuation, as the Court has computed the damages for Chase, the total net result of such a mathematical exercise would considerably exceed six million dollars.

On the total record here, it would appear sufficient to make that finding. No useful purpose would be served by an extensive discussion at this time of the minutiae of other adjustments, additions and subtractions urged by both parties. Even if the Foreign Claims Settlement Commission figures are slightly inflated, they are not so far unrelated to reality that if adjusted, a refund on the part of Citibank

would be required, once the theory of set-off is accepted in this case.

There are good reasons to avoid adjudicating with precision at this time a sum of money representing the value of Citibank's branches. The record in this case is of necessity both complex and incomplete. While the parties have waived any objection based thereon, nonetheless it remains true that this Court did not observe the witnesses at the trial and did not hear them testify. Data and information available in Cuba which might be beneficial to either party was not produced, due to difficulties in respect to access. Specifically, the trial record does not include the result of operations through December 30, 1960, which date is said to be the date of valuation and taking under the Cuban statute. Citibank had an operating loss in August 1960; what was the result for September and October? Were the August results decreased by unlawful conduct of the Cuban Government and perceived likelihood of takeover which chilled the value? Or, was the downturn merely the result of social change entirely lawful under principles of international law? Perhaps the operating results of the former Citibank branches after confiscation would answer this point. The Court could infer that these results are favorable to Citibank because the information is in the "control" of plaintiff, and was not produced, but to do so would be unfair and exalt theory over reality in view of the continuing restrictions on commerce with Cuba.

A court ordinarily does not make unnecessary findings of fact or determine prematurely issues which are in dispute but not essential. The last chapter describing the problems which have arisen between the Republic of Cuba, Banco Nacional and Citibank may not have been written. In the ordinary course of the active business of international banking being conducted by Citibank and also by Banco Nacional, it is conceivable that at some indefinite future time the paths of these parties may cross again. In the ordinary course either bank may become possessed of bills, notes, credits or moneys of the other, and be in a position to use "self-help" leading to further litigation. It appears prudent to defer the making of any unnecessary adjudication of the exact value of the taken branches of Citibank for a future day. It is sufficient for purposes of this case to adjudicate that the value of the confiscated branches of Citibank substantially exceeds the sums already recovered, and therefore the set-off pleaded here may be granted in full in favor of Citibank. To go further with the point at this time would be to engage in judicial mouse-milking.

CONCLUSION

The foregoing, to the extent appropriate, may be regarded as findings of fact and conclusions of law. Any party may, within fifteen (15) days, present formal requests for additional findings of fact as to any point not disposed of directly or inferentially by this decision. Two separate final judgments, one in each action, shall be settled on waiver of notice of settlement or fifteen (15) days notice. While it may be academic to do so, the judgments or may provide that enforcement be stayed, without bond and without the necessity of any further or additional application, pending appellate finality.

Dated: New York, New York
January 4, 1980

Charles L. Brieant
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

BANCO PARA EL COMERCIO EXTERIOR DE CUBA,:

Plaintiff,

-against-

FIRST NATIONAL CITY BANK,

Defendant.

61 Civ. 410(CLB)

JUDGMENT

----------x

This action having come on for trial before the court, Honorable Frederick van Pelt Bryan, District Judge, presiding; and

The issues having been duly tried before Judge Bryan on January 5, 6, 7, 12, 13 and 26, 1977; and

Judge Bryan having died on April 17, 1978, without having rendered a decision or findings of fact or conclusions of law; and

The case having been reassigned to the undersigned in June 1978; and

The parties having consented that the decisions and judgment of this Court, including findings of fact and conclusions of law, rendered upon the written record of the trial conducted before Judge Bryan and post-trial proceedings conducted before the

undersigned, be fully binding upon both parties, without prejudice to the right of either party to appeal therefrom; and

A decision, including findings of fact and conclusions of law, dated January 4, 1980, having been rendered, it is

ORDERED, ADJUDGED AND DECREED that the plaintiff take nothing, and that the action be dismissed on the merits and that the defendant have and recover its costs from the plaintiff; and it is further

ORDERED, that, with respect to the aforesaid award of costs, judgment be stayed, without supersedeas bond and without the necessity of any further or additional application, pending the determination of any appeal which may be taken by plaintiff from the judgment of this court to the United States Court of Appeals for the Second Circuit, and pending further (1) the issuance of a license or other authorization under the Cuban Asset Control Regulations, 31 C.F.R. §515.101 et seq., permitting execution of the aforesaid judgment; or (2) a final administrative or judicial determination that no such license or authorization is required.

_____

U.S.D.J.

New York, New York
March 12, 1980

Consented as to from:

Rabinowitz, Boudin, Standard,
Krinsky & Lieberman

By: /s/_____

Attorneys for Banco Para El
Comercio Exterior de Cuba

Shearman & Sterling

By: /s/_____
Henry Harfield, Esq.

Attorneys for First National City Bank

Opposition

Office - Supreme Court, U.
FILED
JAN 25 1982
ALEXANDER L. STEVA
CLERK

No. 81-984

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FIRST NATIONAL CITY BANK,

Petitioner,

v.

BANCO PARA EL COMERCIO EXTERIOR DE CUBA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. 81-984

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FIRST NATIONAL CITY BANK,

Petitioner,

v.

BANCO PARA EL COMERCIO EXTERIOR DE CUBA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Preliminary Statement

Respondent, a Cuban state trading corporation, commenced this action in February, 1961 to recover a commercial debt arising from the sale of sugar. Petitioner did not dispute Bancec's claim. Instead, it asserted a counterclaim seeking compensation up to the amount due respondent for the Republic of Cuba's nationalization of petitioner's Cuban branches on September 16, 1960 (5a, 9a-10a).[1]

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[1] References to "(a)" and "(b)" are to the opinions of the court of appeals and the district court, respectively, as reprinted in the Appendices to the Petition. Only portions of the district court opinion were reprinted by petitioner; the full opinion is found at 505 F. Supp. 412 (S.D.N.Y. 1980). References to "(Jt.App.)" are to the Joint Appendix in the Court of Appeals.

Bancec contended that, as a state trading corporation with its own judicial capacity and capital, it was not responsible for the acts of the Republic or of Banco Nacional de Cuba, which had implemented the nationalization decree. It further argued that respondent already had recovered the full value of its nationalized property. The district court ruled that the counterclaim was properly asserted against Bancec and that the value of respondent's Cuban property exceeded the $6,000,000 petitioner already had recovered by a sum greater than at issue here. It therefore entered judgment providing that the plaintiff take nothing and that the action be dismissed (Jt.App. 820).

In a unanimous opinion, the court of appeals reversed, holding that respondent was not responsible for obligations of the Republic or Banco Nacional arising from the nationalization and hence that petitioner's counterclaim could not be asserted against respondent. The court of appeals did not reach petitioner's contention concerning the value of the nationalized property.[2] Citibank's petition for rehearing with a suggestion for rehearing *en banc* was denied without any judge voting to rehear the case (App. C).

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[2] If the judgment of the court of appeals is reversed, further proceedings in the district court will be required on the issue of valuation since the court of appeals in *Banco Nacional de Cuba* v. *Chase Manhattan Bank*, 658 F.2d 875, 893-94 (2d Cir. 1981) disagreed in important respects with the standard of valuation applied by the district court in *Chase* and this case. Respondent's contention that a nationalization claim presents a non-justiciable, political question was decided adversely by the court of appeals in its *Chase* decision.

Reasons for Denial of the Writ

1. Petitioner urges issuance of the writ principally so that this Court may provide "an articulation of federal law governing the determination of the respective legal responsibilities of a foreign state and its wholly-owned and controlled agencies and instrumentalities when the state or one of its instrumentalities has brought an action in a court of the United States." Petition, pp. 6-7.

Bancec was a typical state trading corporation, similar in form and function to the enterprises through which all socialist countries conduct their international banking and trade[3] and frequently found in non-socialist Western[4] and Third-World nations as well.[5] Created by Law No. 793 of April 25, 1960 (App. D to Pet.) with "full judicial capacity and capital of its own" (2d), Bancec was authorized, *inter alia*, "[t]o buy in the country and sell abroad all kinds of national agricultural, industrial or mining products" (5d). As the court of appeals found (4a) and as is apparent on the face of the statute (3d), Bancec used the income generated by its activities to cover its costs and to satisfy the amount its Board determined should be set aside as

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[3] See, Quigley, *The Soviet Foreign Trade Monopoly*, 103-125 (1974); Knapp, "The Function, Organization and Activities of Foreign Trade Corporation in the European Socialist Countries" in Schmitthoff, ed., *The Sources of the Law of International Trade* (1964).

[4] See, for example, Friedmann, ed., *The Public Corporation: A Comparative Symposium* (1954) for Australia, Canada, France, West Germany, India, Israel, Italy, New Zealand, South Africa, the United States and the United Kingdom.

[5] See, for example, Fabrikant, *Developing Country State Enterprises: Performance and Control*, 15 Col.J. of Trans.L. 40 (1976); Fabrikant, *PERTAMINA: A Legal and Financial Analysis of a National Oil Company in a Developing Country*, 10 Tex. Int'l.L.J. 495 (1975).

capital reserves for the enterprise's proper operation. Only the surplus—net profits minus capital reserves—was to be transferred to the Republic, which had contributed the enterprise's initial capital. Thus, the Republic's interest in the debt here was no different than the interest of the stockholder of a corporation in its subsidiary's earnings.

The debt sued upon arose from Bancec's normal commercial operations. On August 12, 1960, Bancec entered into a contract to sell to the Cuban Canadian Sugar Co. a quantity of sugar to be delivered abroad and, in turn, entered into a second contract to buy the sugar from the National Institute of Agrarian Reform. The difference in the purchase prices specified in the two contracts left Bancec with a profit on the transaction of ½% of the export price. Bancec was to be paid by Cuban Canadian through an irrevocable letter of credit issued by a New York bank in Bancec's favor (Jt.App. 629). The sugar was shipped in due course and payment in the sum of $193,280 was demanded under the letter of credit issued by petitioner but refused by it.[6]

The rule of law articulated by the court of appeals for enterprises such as Bancec is sound and merely reiterates long-standing and uniform authority; it does not require

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[6] When this action received active attention for the first time in 1975, respondent moved to substitute another state enterprise, Empresa Cubana Exportadora de Azucar y Sus Derivados ("CUBAZUCAR") as successor on the claim. Citibank opposed the motion and the district court, not wishing to "multiply complications in this already complicated litigation," denied the motion "in the sound discretion of the court" under Rule 25(c). Memorandum Decision, August 4, 1975. The district court discussed the transfer of Bancec's claim in its opinion on the merits (13b-14b) but that discussion did not contribute to its conclusion that the counterclaim should be allowed because Bancec was the *alter ego* of the Republic (20a-22b). The court of appeals agreed with respondent that CUBAZUCAR is the successor to the claim asserted in this action (4a-5, fn. 4).

review by this Court. Consistent with basic conflicts of law principles, the court of appeals held that "if the instrumentality has been created as a separate and distinct juridical entity under the laws of the state that owns it, we will normally respect its independent identity for a number of purposes" (8a-9a). The court would, however, "ignore the statutory distinction between the state and its instrumentality" (9a) if the state trading enterprise's claim was governmental as distinct from commercial, the enterprise was not suing "in its own right" *or* if the enterprise was involved in the subject matter of the counterclaim (9a-13a). Applying these principles here, the court of appeals had no difficulty in concluding that the counterclaim must be dismissed.[7]

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[7] In *Banco Nacional de Cuba* v. *Chemical Bank*, 658 F.2d 903 (2d Cir. 1981), the court of appeals reiterated that "we will not ordinarily find the state and the instrumentality alter egos with respect to acts done by the instrumentality in the normal course of its commercial activities" but that counterclaims based on the State's activities would be allowed when the enterprise is pursuing a claim "on behalf of the [foreign] government" rather than pursuing a claim in its own right generated by its own commercial activities. In *Chemical*, the court of appeals applied these principles so as to allow assertion of a counterclaim based upon the Republic's acts against one of Banco Nacional's claims but not another.

Petitioner sees a conflict between the decision here and in *Chemical* only because it fails to acknowledge the distinction drawn by the court of appeals between circumstances in which an entity is acting on its own behalf and on behalf of the State. In *Citibank*, no less than in *Chemical*, the court of appeals considered the question of agency and real party in interest but, unlike its finding with respect to one of the claims in *Chemical*, found that the plaintiff here was suing in its own right and for its own benefit to recover a commercial debt generated by its own activities. For the same reasons, there is no conflict with a district court ruling issued at an early stage of the *Sabbatino* litigation, *Banco Nacional de Cuba* v. *Sabbatino*, 27 F.R.D. 255 (S.D.N.Y. 1961), and never the subject of appellate review. That state corporations may act as the State's agent in some circumstances but not others has been recognized in decisions involving our own government corporations. Compare, for example, the treatment of the Reconstruction Finance Corporation in *United States* v. *Buffalo Coal Mining Co.*, 170 F. Supp. 727, 734-36 (Alaska 1959) and *United States* v.

The uniform legislative, treaty, scholarly and judicial authority supports the position of the court of appeals and respondent. As shown below (11a-13a), the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.*, is careful to respect the distinction drawn by foreign law between a state trading corporation and the foreign State and for reasons which Congress termed "compelling": "If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary." H.R.Rept. No. 94-1487, 94th Cong., 2d Sess. 29 (1976), reprinted in [1976] U.S. Code Cong. and Ad. News 6604, 6628. Congress recognized that there may be particular factual circumstances where traditional principles of agency make the separate legal status of state trading enterprises irrelevant (*e.g.*, "a court might find property held by one agency is really the property of another," *id.*, p. 30); the court of appeals agreed but found those circumstances not present here.

Congress' fears have a firm historical basis. In the nineteenth century and continuing into the pre-World War II period, there was by no means universal recognition of the separate legal status and limited liability of corporations when operating outside of the territory of their creation. See, Wilson, R., *United States Commercial Treaties and International Law* 184-5 (1960). As early as its 1911 Treaty with Japan, the United States sought to achieve such recognition as a necessary legal foundation for international relations and trade. *Ibid.* It continued these efforts in the post-War period by negotiating eleven

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County of Iowa, 295 F.2d 257 (7th Cir. 1961) with its treatment in *Keifer and Keifer* v. *Reconstruction Finance Corporation*, 306 U.S. 381.

Treaties of Friendship, Commerce and Navigation which expressly provide that "companies constituted under the applicable laws and regulations of either High Contracting Party shall have their juridical status recognized within the territories of the other High Contracting Party".[8]

The other major capitalist countries likewise have recognized state trading entities to be distinct from the State and from other state agencies.[9] Similarly, the scholarly authority is of the view that international trade requires respect for the distinct liabilities of state trading enterprises of even thoroughly socialized economies.[10]

United States courts as well have acknowledged the separate status of state trading enterprises in a variety of ways fundamental to the conduct of international trade (*viz.*, in determining whether there are sufficient contacts

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[8] The treaties are with Nicaragua, 9 U.S.T. 449, T.I.A.S. 4024 (1956); Korea, 8 U.S.T. 2217, T.I.A.S. 3947 (1956); Netherlands, 8 U.S.T. 2043, T.I.A.S. 3942 (1956); Iran, 8 U.S.T. 899, T.I.A.S. 3853 (1955); Federal Republic of Germany, 7 U.S.T. 1839, T.I.A.S. 3593 (1954); Japan, 4 U.S.T. 2063, T.I.A.S. 2863 (1953); Denmark, 12 U.S.T. 908, T.I.A.S. 4797 (1951); Greece, 5 U.S.T. 1829, T.I.A.S. 3057 (1951); Israel, 5 U.S.T. 550, T.I.A.S. 2948 (1951); Ireland, 1 U.S.T. 785, T.I.A.S. 2155 (1950); Italy, 63 Stat. 2255, T.I.A.S. 1965 (1948).

[9] See, for example, the commercial treaties of the USSR with France, 221 UNTS 79 (1955); Italy, 217 UNTS 918 (1955); the Federal Republic of Germany, 25 April 1958, 347 UNTS 96 (1959); Denmark, August 17, 1946, 8 UNTS 201; India, December 2, 1953, 340 UNTS 143 (1956); Japan, December 6, 1957, 325 UNTS 35 (1959); the treaty of Japan with Yugoslavia, February 28, 1959, 341 UNTS 179 (1959); the treaty of Australia with Hungary, December 5, 1957, 638 UNTS 209 (1968); and the treaty of Switzerland with the USSR, March 17, 1948, 217 UNTS 87 (1955).

[10] See, for example, Berman, Harold J., *The Legal Framework of Trade Between Planned and Mixed Economies: Soviet-American Example*, 24 Law and Contemporary Problems, 482, 498 (1959); and Pisar, Samuel, *Coexistence in Commerce: Guidelines for Transactions Between East and West*, 262-268 (1970).

with the forum to support *in personam* jurisdiction and in applying principles of agency to the relations between the enterprises and the State).[11] The courts of England have rejected any merger of foreign state enterprises and the State in a case involving CUBAZUCAR, the successor to the claim sued upon here, *Primero Congreso del Partido* [1978], 1 Q.B. 500, 531-43 (1977) (Goff, J.), and in a case involving the Polish state enterprise for the export of sugar, *C. Czarnikow, Ltd.* v. *Central Handlu Zagranicznego Rolimpex,* [1978] 3 W.L.R. 274 (House of Lords).

Notwithstanding this authority, petitioner asks this court to merge the State and state trading corporations for nationalization cases.[12] Citibank's suggestion is devoid of authority and inconsistent with the reasons for recognizing the separate juridical status of such enterprises in the first place. Nor is there any reason to disregard the status of these enterprises in one class of cases but not others and no reason to believe adoption of a nationalization exception

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[11] See for example, *Vicente* v. *Trinidad,* 53 A.D.2d 76, 385 N.Y.S.2d 83 (1st Dept. 1970), *aff'd.* 42 N.Y.2d 929, 397 N.Y.S.2d 1007 (1977); *Nat'l American Corp.* v. *Fed. Rep. of Nigeria,* 448 F. Supp. 622, 637 n. 26 (S.D.N.Y. 1978), *aff'd. on other grounds* 597 F.2d 314 (2d Cir. 1979); *Verlinden, N.V.* v. *Central Bank of Nigeria,* 488 F. Supp. 1284, 1301 (S.D.N.Y. 1981), *rev'd. on other grounds* 647 F.2d 320 (2d Cir. 1981), cert. granted on other issue in No. 81-920, —— U.S. ——, 50 U.S.L.W. 3527 (Jan. 12, 1982); *Texas Trading and Milling Corp.* v. *Fed. Rep. of Nigeria,* 647 F.2d 300, 314-5 (2d Cir. 1981), cert. den. —— U.S. ——, 50 U.S.L.W. 3527 (Jan. 12, 1982).

[12] Any such rule would have wide application. Between 1960 and 1974 there were at least 875 instances of the nationalization of foreign-owned enterprises in 62 countries. Report of the Economic and Social Council of the United Nations, Twenty-Ninth Session, A/9716, 20 September, 1974, Annex, pp. 1-20. These figures include the expropriation of foreign enterprises by at least 34 countries considered by the State Department to be "non-communist." U.S. Department of State, *Report of Nationalization, Expropriation and Other Takings of U.S. and Certain Foreign Property,* 11 Int'l Legal Materials 84 (Jan. 1972). The rate of nationalizations has accelerated since 1974.

by our courts would not encourage other countries to disregard the separate status of United States subsidiaries generally or for classes of cases particularly sympathetic to the local party from their perspective.

Furthermore, petitioner's nationalization exception calls upon the judiciary to make and implement political decisions committed to other branches of government. Citibank singles out for special consideration a class of defendants, United States businesses which have suffered foreign nationalizations, and asks that the normal rules of offset and counterclaim be altered in their favor. More bluntly, it asks that the judiciary fashion its own mechanism for compensating these enterprises by sanctioning their seizure of property that is owned under settled principles of law by foreign entities not responsible for the nationalizations.

The relief sought by petition from the courts has been afforded only by the political branches of government and only after the most careful weighing of the long-term diplomatic, economic and equitable considerations. Beginning at least with the disposition of Soviet assets in the United States, Congress and the Executive on a number of occasions have taken all assets in the United States of a foreign government *and* of its public and private corporations (and even of its citizens); combined all those assets into a single fund; and distributed the fund to United States claimants through a process of administrative adjudication pursuant to Congressionally declared standards.[13] The courts repeatedly have recognized the unique powers of the political

[13] For a description of these programs, see, for example, *United States* v. *Pink*, 315 U.S. 203; *Sardino* v. *Federal Reserve Bank*, 361 F.2d 106 (2d Cir. 1966), *cert. den.* 382 U.S. 1027; 1972 Annual Report of the Foreign Claims Settlement Commission; and Lillich and Weston, *International Claims: Their Settlement by Lump-Sum Agreements, Vols. 1 and 2* (1975). In effect, this was what the political branches achieved in the Iranian situation as well by

branches in deciding upon such programs. See, for example, *United States* v. *Pink*, 315 U.S. 203 and *Sardino* v. *Federal Reserve Bank*, 361 F.2d 106 (2d Cir. 1966), *cert. den.* 382 U.S. 1027.

The same situation pertains with regard to Cuban assets. Pursuant to statutory authority, the Executive has issued regulations freezing all assets in the United States of the Cuban State, all Cuban public and private corporations and all Cuban citizens. Cuban Assets Control Regulations, 31 C.F.R. § 515 *et seq.* No decision has been made as yet by the political branches as to their disposition.[14]

There can be no reasonable doubt that the court of appeals was correct in refusing to take these political measures, whether under the district court's guise of deciding the issue according to the "equities" or otherwise. In-

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freezing the assets of both the Iranian State and Iranian state enterprises, and pooling and transferring a portion of them to secure awards of the International Tribunal pursuant to the Algerian Declarations. See *Dames and Moore* v. *Regan*, —— U.S. ——, 101 S.Ct. 2972 (1981).

[14] Petitioner thus completely misconceives the matter in urging review so that the political branches may receive this Court's guidance in disposition of the frozen Cuban assets. The decision whether to pool the assets of a foreign state, its state enterprises and its nationals for the satisfaction of claims is a political, not a judicial, decision.

We also note that petitioner is equally in error in urging review here for the sake of providing guidance for the lower courts in what petitioner implies are a great number of pending Cuban and Iranian cases. *Banco Nacional de Cuba* v. *Chemical Bank, supra*, is the only pending Cuban case involving the "separate entity" issue and it does not involve a nationalization counterclaim at all. Similarly, the Iranian cases hardly provides reason for review of the instant action: none involve counterclaims; all of the actions are suspended and are likely to terminate without further proceedings; and any resolution of the "separate entity" issue in those cases, if ever needed, can and preferably should be made with specific focus upon Iranian entities and the claims brought against them.

stead, the court of appeals properly decided the issue upon the basis of sound and fully-supported neutral legal principles, expressly recognizing that the respondent's recovery here would be frozen under the control of the Treasury Department's Cuban Assets Control Regulations to await ultimate disposition according to the decision of the political branches of government (13a).

Petitioner additionally argues that the court of appeals erred for reasons wholly idiosyncratic to this case: that Bancec was dissolved subsequent to the commencement of this action and counsel obtained leave to substitute the Republic of Cuba as plaintiff shortly thereafter (albeit counsel did not make any such substitution). Upon the strength of these events, petitioner seeks a factual determination that the Republic of Cuba is a real party in interest which has deliberately chosen to prosecute *its* claim through a different party so as to avoid liability on Citibank's counterclaim. Pet., p. 7. Even if they were of any significance to this case, these factual arguments hardly present an important issue of federal law meriting this Court's review and could not have any effect beyond this case at all. Further, the articulation of federal law by the court of appeals allows for proof that the real party in interest is different than the party suing.

Even in the narrow context of this case, petitioner's contentions are without significance. Neither the court of appeals nor the district court based its decision upon these events and for good reason. Although Bancec has been dissolved, the purchase price sued for here will form part of the general assets of the successor state trading enterprise, CUBAZUCAR, not part of the assets of the Republic.[15] Further, as the record shows, counsel sought

[15] Of course, CUBAZUCAR will not enjoy the effective use of that property, as it is frozen under the Cuban Assets Control Regulations.

leave to substitute the Republic because of his mistaken belief that under the Cuban statutes the Republic, rather than a state enterprise, was the successor to the claim here but discovered his error before filing the amended complaint. See Krinsky affidavit, filed July 1, 1975 and Reply Brief of same date. This is hardly proof of anything. More generally, there is nothing to support petitioner's contention that Bancec is merely the nominal plaintiff chosen by the Republic to prosecute its claim without exposing itself to nationalization counterclaims. Bancec was founded before the nationalizations were authorized, let alone ordered, and, as Law No. 793 makes clear (App. D. to Pet.), was created for precisely the same reasons that has led every socialist and many non-socialist countries to form state trading enterprises for the conduct of their nation's international trade—reasons which, as shown, our jurisprudence has found should be respected.

2. Petitioner's contention that the decision below conflicts with *National City Bank* v. *Republic of China,* 348 U.S. 356 is simply fanciful. In *Republic of China,* the Court held that a foreign sovereign suing in our courts subjects itself to the normal rules of set-off and counterclaim up to the amount of it. At least to that extent, the Court ruled, the foreign sovereign must accept generally applicable principles of law and not benefit from any special immunities. This is precisely the principle followed by the court below: it simply applied the normal rule of law, which respects the foreign law establishing an entity with a separate and distinct juridical capacity and liability. Indeed, petitioner seeks to stand *Republic of China* on its head by arguing that special rules, and essentially political ones at that, should apply when foreign state enterprises sue.

Nor does anything in the record in *Republic of China* cast that decision in a different light, petitioner's misleading description of the case notwithstanding. The pleadings and record are explicit that the plaintiff foreign state, the National Government of China (Taiwan), claimed legal title to the funds on deposit with Citibank and sought to recover the monies for use in furthering governmental purposes. The Republic of China's brief in this Court, pp. 6-7, put the matter clearly:

> "On December 3, 1948, when for reasons now a matter of history, it became important to transfer government funds out of the mainland of China, respondent [Republic of China], through its agency, the Shanghai-Nanking Railway Administration, requested petitioner's Shanghai office to accept a substantial deposit to be opened at petitioner's office in the name of respondent's agency. Petitioner agreed . . . and an account was established . . . in the name of respondent's agency, The Shanghai-Nanking Railway Administration . . . After respondent's National Government became located in Taiwan (Formosa), respondent [Republic of China], being in urgent need of the funds to carry out governmental functions, made several demands upon petitioner for payment to it [of the funds].

Far from the foreign State being a party to the action and asserting that it had taken over the funds of a state enterprise for governmental purposes, here, as the court of appeals recognized, "the state [is] absent and suit [has] been brought by an instrumentality in its own right" (13a) to collect upon a commercial debt generated by its own commercial activities (11a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
January 25, 1982

Respectfully submitted,

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Petitioner's Reply Brief

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No. 81-984

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FIRST NATIONAL CITY BANK,
Petitioner,

v.

BANCO PARA EL COMERCIO EXTERIOR DE CUBA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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February 2, 1982

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Pursuant to Sup. Ct. R. 28.1, a list of Petitioner's parents, subsidiaries and affiliates appears as Appendix E to the Petition.

In The

Supreme Court of the United States

October Term, 1981

First National City Bank,

Petitioner,

v.

Banco Para El Comercio Exterior De Cuba,

Respondent.

Petition For a Writ of Certiorari to the
United States Court of Appeals for The Second Circuit

PETITIONER'S REPLY BRIEF

First National City Bank ("Citibank") submits this Brief in reply to the Brief in Opposition filed by Banco Para el Comercio Exterior De Cuba ("Respondent" or "Bancec").[1] Respondent's Brief in Opposition provides strong evidence of the importance of the question presented and the need to have it settled by this Court.

Respondent has not questioned Citibank's formulation of the question presented for review. Instead, it argues, in effect, for an affirmance on the merits. Respondent contends that this Court should not address an important question of law solely because, in its view, the lower court correctly decided that important question. But the issue on a petition for a writ of certiorari is whether the question

[1] Bancec no longer exists; Cuba dissolved Bancec in 1961, three weeks after beginning this lawsuit.

presented is sufficiently important and unsettled to merit this Court's review. This case presents such a question, and Respondent's vehement but unsound defense of the court of appeals' decision serves only to emphasize the importance of the issue.[2]

1. Respondent attempts to blunt the impact of the lower court's rulings on the Foreign Sovereign Immunities Act. Congress specifically charged the courts to determine the meaning and parameters of the Immunities Act. 28 U.S.C. § 1602. The importance of dispositive pronouncement is clearly signaled by this Court's grant of certiorari in *Verlinden, B.V.* v. *Central Bank of Nigeria,* 50 U.S.L.W. 3528 (Jan. 12, 1982), as Respondent has noted, perhaps inadvertently, by its citation of *Verlinden* in its substantive argument. (*See* Brief in Opposition at 8 n. 11.) Lower court treatment of the Immunities Act should be carefully scrutinized.[3] The issue in this case arises in the same context and is of comparable importance to the issue in *Ver-*

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[2] Citibank shall address fully, in its brief on the merits, every substantive point that Respondent has raised. It suffices for our present purpose to note that Respondent has thoroughly mischaracterized every substantive point from the nature of "state trading corporations" (and Bancec was much more than such a corporation) to the legislative history of the Foreign Sovereign Immunities Act, and the conflict of the lower court's decision with the decision of this Court in *National City Bank* v. *Republic of China,* 348 U.S. 356 (1955). The Court is respectfully requested to compare Respondent's brief with the language of Justice Reed in *Republic of China*:

> Here we have an entirely disconnected claim on overdue national notes brought forward as a defense to an action to recover a bank deposit. The Court recognizes that the counterclaim is not related to China's cause of action against the City Bank. It says:
>
> > "The point is that the ultimate thrust of the consideration of fair dealing which allows a setoff or counterclaim based on the same subject matter reaches the present situation."

348 U.S. at 366, 372 (Reed, J., dissenting).

[3] The need for such scrutiny is particularly evident, when, as in this case, the lower court's decision is inconsistent with decisions it announced in contemporaneous opinions. *See* Petition at 15-19.

linden. However, the question presented here raises a substantive issue that is not subsumed in the narrow question presented in *Verlinden*. In the interest of judicial economy, if for no other reason, the writ should issue.

2. The decision of the appellate court intrudes on the proper function of a trial court. The district court explicitly found as a fact that Bancec was the alter ego of the Cuban government. Contrary to Respondent's characterization of the trial court's decision, that court rested its decision explicitly on, among other things, the uncontroverted fact that the claim asserted in the name of Bancec had, pursuant to Cuban statutes, been assigned either to the Cuban Ministry of Foreign Trade (which, under numerous precedents, is undeniably an alter ego of the government) or to Banco Nacional de Cuba (which the Second Circuit itself found in *Banco Nacional de Cuba* v. *First National City Bank*, 478 F.2d 191 (2d Cir. 1973), to be an alter ego of the government for purposes of Citibank's counterclaims). An appellate court may overturn such a finding of fact only if it determines that the finding is clearly erroneous. Fed. R. Civ. P. 52(a). The court of appeals made no such determination, nor could it have done so on the record below. To deny the trier of fact his fact finding function is to undermine the very distinction of trial from appeal.

3. Finally, and perhaps of most importance, Respondent has inadvertently exposed the essential injustice of the court of appeals' decision. Contrary to fact, Respondent asserts that Citibank desires an "exception" in nationalization cases to a nonexistent "rule" that a state trading company may not be deemed an alter ego of a government that wholly owns and controls the company and manipulates its assets upon its dissolution. That is, simply, wrong. Citibank petitions this Court not for an "exception" or "rule," but for a ruling compelled by the findings of the district court and fundamental principles of fair play.

When, as here, a foreign state confiscates U.S. property in violation of international law,[4] it may not interpose the spurious "autonomy" of a nonexistent government banking and trading monopoly in order to defeat otherwise allowable counterclaims interposed by the U.S. corporations whose property was confiscated. When Che Guevara, who was concurrently president of Banco Nacional and Bancec, ordered the Cuban militia to seize the branches of Citibank, as well as the assets of hundreds of other private U.S. corporations and citizens, in retaliation for purported grievances that Cuba had against the U.S. government, he paid no attention to the fact that those entities were juridical entities separate in every respect from the U.S. government. It shocks the conscience, and surely merits the attention of this Court, when an appellate court, in disregard of the findings of the trial court, subsequently permits the Cuban government, in the guise of a nonexistent, spurious enterprise, to avail itself of our laws by making a claim against an aggrieved U.S. citizen while denying that citizen the right to assert counterclaims that would curtail recovery.

To give these issues their proper review, to answer recurring questions, and to render a fair and equitable decision, this Court should grant Citibank's petition for a writ of certiorari.

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[4] The Second Circuit held that Cuba's confiscation of Citibank's property was a violation of international law. *Banco Nacional de Cuba* v. *First National City Bank*, 478 F.2d 191 (2d Cir. 1973).

Dated: New York, New York
February 2, 1982

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In the Supreme Court of the United States

OCTOBER TERM, 1982

FIRST NATIONAL CITY BANK, PETITIONER

v.

BANCO PARA EL COMERCIO EXTERIOR DE CUBA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Respondent Banco Para El Comercio Exterior de Cuba ("Bancec") was a wholly-owned banking and foreign trade instrumentality of the Republic of Cuba. In February 1961, Bancec brought suit in the United States District Court for the Southern District of New York against petitioner First National City Bank ("Citibank") to recover $193,280 on an unpaid letter of credit. The letter of credit had been established in favor of Bancec by Cuban Canadian Sugar Company to finance a purchase of sugar from Bancec.[1] Bancec had acquired title to the sugar from the

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[1]See Contract No. 555 between Cuban Canadian Sugar Co., Inc. and Banco Para El Comercio Exterior de Cuba, Exh. F appended to the stipulation of facts before the district court.

Cuban Institute of Agrarian Reform ("INRA"),[2] which had expropriated the sugar from its original owners.[3]

In response to Bancec's letter of credit claim, Citibank asserted that the Republic of Cuba was the real party in interest in the litigation and counterclaimed for certain uncompensated losses arising from Cuba's unlawful expropriation of its 11 Cuban branches. Because those losses exceeded the amount of Bancec's claim, Citibank urged that the complaint should be dismissed.

The district court found that Bancec had been created by the revolutionary Cuban government on May 4, 1960, about five months before the nationalization of Citibank's branches and about nine months before this suit was instituted (Pet. App. 12b). On February 23, 1961, about three weeks after this suit was filed, the Cuban government dissolved Bancec and assigned its rights, claims, and assets, to two governmental agencies—the Banco Nacional de Cuba and a newly created Ministry of Foreign Trade. The letter of credit claim involved in this case apparently passed to the Ministry (*id.* at 4a-5a n.4; but see *id.* at 13b-14b).[4] On April 7, 1961, the parties stipulated that the Republic of Cuba itself should be substituted as plaintiff and should file an amended complaint (*id.* at 15b). The district court approved the stipulation, but the amended complaint was never filed (*ibid.*).

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[2]See Contract No. 556 between Bank of Cuba for Foreign Trade and the National Institute of Agrarian Reform, Exh. G appended to the stipulation of facts.

[3]See Resolution No. 127 of the National Institute of Agrarian Reform, Exh. E appended to the stipulation of facts. The original owner of the sugar appears to have been a Cuban branch or subsidiary of Cuban Canadian Sugar Co. See *id.* at Exhs. E and G.

[4]The Republic of Cuba asserts that the claim thereafter passed in turn to the Empresa Cubana de Exportaciones and, upon its dissolution, to the Empresa Cubana Exportadora de Azucary sus Derivados, both government agencies or instrumentalities (Pet. App. 14b).

During its brief existence, Bancec was wholly-owned and controlled by the Cuban government. It was an instrument of Cuban national economic policy, designed to cooperate with and contribute to foreign trade programs adopted by the Banco Nacional de Cuba (*id.* at 4d). As such, it was required to deposit its profits with the state treasury (*id.* at 3a-4a). Furthermore, although Bancec nominally was set up as " '[a]n official autonomous credit institution for foreign trade * * * with full juridical capacity and capital of its own' " (*id.* at 3a), all of its capital was provided by the Republic (*id.* at 3a), and Bancec's president was Che Guevara, who concurrently served as the Cuban Minister of State and the president of Banco Nacional de Cuba (see Cuban Law No. 793, Para. XI, Pet. App. 8d; Pet. App. 10a). It was Banco Nacional that carried out the expropriation of petitioner's branches, on orders signed by Che Guevara (*id.* at 5a-6a, 10a).

2. In light of these facts, the district court concluded that Bancec was the alter ego[5] of the Republic of Cuba and held Bancec liable on Citibank's counterclaim. The court found (Pet. App. 15b-16b) that:

> Bancec was created by the Government to engage in a state function. All of its capital was contributed by the Government, and it had no function to fulfill, except to manage the export of commodities for the account of the Government. Thereafter, the devolution of the

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[5]The term "alter ego" traditionally is used to indicate an interrelationship between two entities that justifies disregard of their separate legal status. While the term has been applied most frequently when a parent corporation is held liable for the acts or obligations of a corporate instrumentality, it also is used to encompass the reciprocal situation in which a corporate instrumentality is held responsible for the acts or obligations of its parent, particularly in a counterclaim context. See 1 Fletcher Cyclopedia of Corporations §§ 37 and 41.3 (Perm. ed 1974).

> claim, however viewed, brings it into the hands of the Ministry [of Foreign Trade], or Banco Nacional, each an *alter ego* of the Cuban Government.

After noting that Banco Nacional previously had been held to be an alter ego of the Cuban government (*id.* at 9b), the district court, looking to "the realities of the situation," perceived no factual or legal basis for treating Bancec any differently (*id.* at 20b). The court did not consider itseif bound by Cuba's characterization of Bancec as "autonomous." It determined (*id.* at 20b-22b) that:

> Bancec lacked an independent existence, and was a mere arm of the Cuban Government, performing a purely governmental function. The control of Bancec was exclusively in the hands of the Government, and Bancec was established solely to further Governmental purposes. Moreover, Bancec was totally dependent on the Government for financing and required to remit all of its profits to the Government.
>
> * * * * *
>
> Bancec is not a mere private corporation, the stock of which is owned by the Cuban Government, but an agency of the Cuban Government in the conduct of the sort of matters which even in a country characterized by private capitalism, tend to be supervised and managed by the Government. Where the equities are so strong in favor of the counter-claiming defendants, as they are in this case, the Court should recognize the practicalities of the transactions. Doing justice in the case should not be obfuscated or side-tracked by self-serving recitals in post-revolutionary statutes of the Cuban Government, undoubtedly drawn with litigation of this sort in mind. The Court concludes that Bancec is an *alter ego* of the Cuban Government.

The district court further held that Citibank's counterclaim was not precluded by application of the act of state doctrine, relying primarily on this Court's decisions in *First National City Bank* v. *Banco Nacional de Cuba ("Citibank I")*, 406 U.S. 759 (1972), and *National City Bank* v. *Republic of China ("Republic of China")*, 348 U.S. 356 (1955).[6] The court also held that the counterclaim was authorized by the Hickenlooper *(Sabbatino)* Amendment, 22 U.S.C. 2370(e)(2) (Pet. App. 24b).

3. The court of appeals reversed. It "agree[d] with the district court's descriptions of Bancec's functions and its status as a wholly-owned instrumentality of the Cuban government" (Pet. App. 8a). The court concluded, however, that Bancec was not Cuba's alter ego for purposes of the counterclaim (*id.* at 8a-9a):

> [A]n instrumentality of a government is not necessarily an alter ego of that government for all purposes. If the instrumentality has been created as a separate and distinct juridical entity under the laws of the state that owns it, we will normally respect its independent identity for a number of purposes. * * *
>
> We will, on the other hand, ignore the statutory distinction between the state and its instrumentality when the subject matter of the counterclaim assertible against the state [is] conduct in which the instrumentality had a key role.

The court distinguished Citibank's pursuit of its counterclaim against Banco Nacional in *Citibank I* on the ground that Banco Nacional had played a major role in the expropriation of Citibank's branches. The court believed that it

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[6]The district court noted that Citibank had received a *Bernstein* letter from the Department of State, expressing the view that the suit could be maintained without impairing the foreign relations interests of the United States (Pet. App. 24b-26b). See *Bernstein* v. *N.V. Nederlandsche*, 210 F. 2d 375 (2d Cir. 1954).

was only by virtue of that conduct that Banco Nacional became an alter ego of the Cuban government for purposes of the expropriation counterclaim (Pet. App. 9a-10a). The court viewed Bancec's situation as "materially different" (*id.* at 11a):

> Although Bancec was an instrumentality of the Cuban government, it was principally engaged in promoting foreign trade. It was this engagement that gave rise to the claim it asserts in the present lawsuit. The claim is a purely commercial one having no connection with the revolution or the expropriations—except that the expropriation led Citibank to refuse payment. And Citibank has not shown that Bancec played any role whatever in the expropriations of Citibank's branches.

DISCUSSION

1. The court of appeals has decided an important issue of federal law[7] that warrants review by this Court. The rule fashioned by the court of appeals will severely limit the ability of American claimants to raise valid expropriation claims in proceedings instituted against them in the United States by foreign government instrumentalities. The resulting denial of a right of setoff to American claimants will impair the interests of the United States in the protection of our citizens and their commercial dealings abroad.

Protecting overseas commerce and investment, and maintenance of legal standards and procedures for that purpose, are important objectives of American foreign policy. Congress has enacted several statutes to further these purposes.

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[7]The question of whether and under what circumstances a foreign state and its instrumentalities may be subjected to a jurisdiction of our courts is a uniquely federal question, for "[e]very judicial action exercising or relinquishing jurisdiction over * * * a foreign government has its effect upon our relations with that government." *Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945); see *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427 n.25 (1964).

See, *e.g.*, 22 U.S.C. 2351(b)(4), (6) (empowering the President to take steps to discourage expropriations by countries receiving foreign assistance); 22 U.S.C. 2370(e)(1) (requiring suspension of foreign assistance to countries that expropriate American property without timely compensation). Congress also has permitted recourse to federal courts in certain circumstances for adjustment of expropriation claims against foreign sovereigns. See 22 U.S.C. 2370(e)(2) (restricting application of the act of state doctrine); 28 U.S.C. 1605(a)(3) (denying sovereign immunity in certain expropriation cases). Likewise, the United States has an extensive network of commercial treaties and agreements that prescribe standards and procedures for protection of overseas investment.[8] Pursuant to those treaties, and multilateral conventions such as the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, approved Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. 6090, and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done June 10, 1958, 21 U.S.T. 2517, T.I.A.S. 6997, the United States promotes the availability of domestic and international forums for the equitable resolution of transnational investment and commercial disputes.

The court of appeals' decision threatens to undermine these important federal interests. The decision provides to foreign governments contemplating expropriation a blueprint on how to insulate their instrumentalities from liabilities that might otherwise be adjudicated in the United States courts. Under the court of appeals' holding, an instrumentality of an expropriating state will be shielded from liability so long as the instrumentality does not play a direct and

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[8]See U.S. Dep't of State, Publication No. 9173, *Friendship, Commerce, and Navigation and Similar Treaties* (1981), *reprinted in* 20 International Legal Materials 565 (1981).

substantial role in the expropriation. Accordingly, governments contemplating expropriation may protect themselves from liability in American courts simply by ensuring that their instrumentalities with assets or claims in the United States do not play a "key role" in the expropriation.

The court of appeals' decision also limits the ability of American firms holding foreign government assets to rely on those assets as a guarantee of the security of their own investments and as a means to facilitate settlement of expropriation disputes. It is common for foreign governments and their agencies to make commercial deposits in American banks, and to entrust securities to their care; banks also may issue letters of credit in favor of, or hold funds payable to, such governments. These assets traditionally have constituted a significant inducement to stability in investment relationships and have provided a source of leverage for American investors seeking negotiated settlements of their claims.[9] The court of appeals' decision diminishes the value of foreign government assets as a source of stability in investment relationships. The decision eliminates a key element of the American investor's bargaining position—the right to assert a setoff against the assets of a foreign government instrumentality that did not play a "key role" in the expropriation process.

2. The decision of the court of appeals raises the narrow but important question of when the separate identity of an instrumentality of a foreign state should be disregarded to allow a counterclaim to be asserted against it based on the

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[9]For example, American banks set off their expropriation claims two years before the government froze Cuban assets in 1963, thus providing early leverage for a settlement and preventing the flight of additional assets.

obligations of its parent state.[10] In relying on a strong presumption favoring recognition of separate juridical status, the court of appeals has ignored other relevant considerations. It has given undue weight to the foreign state's self-serving declarations, while disregarding both the procedural status of this case and equitable factors that traditionally have been deemed relevant in analogous domestic law situations.

a. This Court, and the lower federal courts, have not hesitated to "pierce the corporate veil" to avoid miscarriages of justice in proceedings involving corporations and their parents or subsidiaries. Commercial instrumentalities of foreign sovereigns require similar scrutiny. Foreign states may have unfettered power to create, dissolve, and control subsidiary corporations, and to assign their assets and liabilities, free from traditional legal constraints and without attention to corporate formalities. Foreign states also may use subsidiary corporations or instrumentalities not only for business purposes, but also for the execution of government policy.

This Court has held that a broad range of factors must be considered in deciding whether to disregard the separate legal status of a corporate entity that is controlled in this manner. While acknowledging that recognition of separate identity is the rule, rather than the exception, the Court has carefully scrutinized the degree of control actually exercised, the common purpose served, the commingling of

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[10]The Foreign Sovereign Immunities Act, 28 U.S.C. 1602 *et seq.*, does not resolve this question. See H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 12 (1976):

> The bill is not intended to affect the substantive law of liability. Nor is it intended to affect either diplomatic or consular immunity, or the attribution of responsibility between or among entities of a foreign state; for example, whether the proper entity of a foreign state has been sued, or whether an entity sued is liable in whole or in part for the claimed wrong.

functions and resources, and other similar criteria, in rendering a decision on whether the entities in question are truly separate. See, *e.g.*, *NLRB* v. *Deena Artware, Inc.*, 361 U.S. 398, 402-404 (1960), (footnotes omitted):

> [A]s Mr. Justice Cardozo said in *Berkey* v. *Third Avenue R. Co.*, 244 N.Y. 84, 95, 155 N.E. 58, 61, "Dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent. Where control is less than this, we are remitted to the tests of honesty and justice." That is not a complete catalogue. The several companies may be represented as one. Apart from that is the question whether in fact the economic enterprise is one, the corporate forms being largely paper arrangements that do not reflect the business realities. One company may in fact be operated as a division of another; one may be only a shell, inadequately financed; the affairs of the group may be so intermingled that no distinct corporate lines are maintained. These are some, though by no means all, of the relevant considerations, as the authorities recognize.

Accord, *Pepper* v. *Litton*, 308 U.S. 295, 310 (1939); *Consolidated Rock Co.* v. *DuBois*, 312 U.S. 510, 523-524 (1941); *Davis* v. *Alexander*, 269 U.S. 114, 117 (1925); see 1 Fletcher, *supra*, §§ 41-46. These same factors are relevant in the present context.[11]

We believe, moreover, that there is a need for special scrutiny of juridical status in cases involving instrumentalities of foreign states that engage in a general program of

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[11]In analyzing the relationship between a foreign state and its agencies and instrumentalities, it may be appropriate to accord individual factors different weights and to add other factors to the analysis. A flexible approach may be required in particular cases due to the difficulty in proving relevant facts concerning a foreign nation's treatment of its instrumentalities.

expropriation. Widespread expropriation may be accompanied, as in the present case, by changes in corporate status that reflect the approach of a government more interested in rapidly achieving its public policy—expropriation—than in observing the formalities of corporate form for business ends. The lower courts already have determined that Bancec's sister instrumentality, the Banco Nacional, served as a government agent in nationalizing Citibank's Cuban branches (see pages 5-6, *supra*). But the Cuban expropriation program was not directed selectively at banks; it extended to many forms of investment in Cuba. Bancec participated in the expropriation program indirectly, yet substantially, by arranging for the sale of the expropriated sugar that forms the basis for this lawsuit (see pages 1-2, *supra*).

b. The procedural posture of this case presents a strong additional reason for looking beyond the nominal separation of Bancec and the Republic of Cuba. Bancec initiated this proceeding against Citibank in order to obtain the use of United States courts to assert its claim. While it is willing to use our courts for its offensive purposes, it is unwilling to accept adjudication in the same proceeding of Citibank's counterclaim. That position is not agreeable with traditional concepts of equity.

In *National City Bank* v. *Republic of China, supra*, this Court held that when "[a] sovereign has freely come as a suitor into our courts * * * the consideration of fair dealing" permits the American defendant to assert unrelated counterclaims against the foreign sovereign up to the amount of its own recovery. 348 U.S. 364-365. Thus, when a foreign state has invoked our laws, it may not do so "free from the claims of justice." *Id.* at 362. This restriction on general concepts of sovereign immunity has now been codified in the Foreign Sovereign Immunities Act, 28 U.S.C. 1607(c); see H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 23 (1976).

In *First National City Bank* v. *Banco Nacional de Cuba, supra*, this Court resolved the related question whether the act of state doctrine bars the prosecution of a counterclaim arising from the expropriation of property within the foreign state's territory. A majority of the Court held that the act of state doctrine does not bar such a counterclaim.[12] Rather, as in *Republic of China*, the Court held that a counterclaim may be interposed by an American defendant to defeat any affirmative recovery against it.[13]

The question presented in this case—whether Bancec is properly viewed as an alter ego of Cuba and thus is amenable to a counterclaim based on Cuba's expropriation—is closely linked to the questions decided in *Republic of China* and *Citibank I*. While this Court's past decisions do not resolve the question raised in the present case, this case raises the same equitable concerns that prompted the Court in *Republic of China* and *Citibank I* to permit counterclaims by American claimants against foreign sovereigns who invoke the assistance of our courts.

3. The unduly narrow legal standard adopted by the court of appeals caused it to disregard the relevant factors discussed above and to reach the erroneous conclusion that

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[12]The plurality held that the act of state doctrine was not a bar to the counterclaim there at issue because the Department of State, in a *Bernstein* letter, had represented to the Court that application of that doctrine would not advance the interests of American foreign policy. 406 U.S. at 762-770. Justice Douglas considered the case controlled by *Republic of China*. *Id.* at 770-773. Justice Powell concluded that permitting the counterclaim would not interfere with the delicate foreign relations supervised by the political branches of government. *Id.* at 773-776.

[13]On remand in *Citibank I*, the court of appeals upheld Citibank's counterclaim, finding that Cuba's expropriation of its branches had been retaliatory, discriminatory, and without compensation, in violation of international law. 478 F. 2d 191 (2d Cir. 1973).

Bancec is not the alter ego of the Republic of Cuba. Among the material facts that support the conclusion that an alter ego relationship exists are the following. As noted on pages 1-4, *supra*, Bancec was controlled by a board of directors composed entirely of government officials, and the instrumentality was owned and financed solely by the government. The President of Bancec also was the Minister of State and President of Banco Nacional de Cuba and was responsible for directing the expropriation of Citibank's branches.

Moreover, Bancec was dissolved by the Cuban government shortly after bringing suit and its claim against Citibank reverted to the government. Subsequent holders of the Bancec claim were in turn dissolved by the Cuban government in the fluid post-revolutionary environment; indeed, the claim was transferred among various agencies of the government at will. In recognition of the reality of the situation, counsel for Bancec stipulated that Cuba was the real party in interest in this lawsuit and the district court thereupon approved the filing of an amended complaint that would substitute Cuba for Bancec.

Finally, it is impossible to view Bancec as a stranger to Cuba's expropriation program. The claim lodged by Bancec against Citibank arose out of Bancec's sale of expropriated sugar acquired from the government. See generally *Banco Nacional de Cuba* v. *Sabbatino*, 27 F.R.D. 255 (S.D. N.Y. 1961). It was, of course, the same government-directed expropriation program that injured Citibank. That expropriation program has been found to be retaliatory, discriminatory, and without compensation, in violation of international law. See *Banco Nacional de Cuba* v. *First National City Bank*, 478 F. 2d 191 (2d Cir. 1973).

These factors support the district court's conclusion that Bancec and the Republic of Cuba are alter egos. In the conduct of its wide-ranging expropriation program, Cuba

accorded neither the permanency nor the autonomy to its instrumentalities that are a basic prerequisite to respecting their separate legal identity. In these circumstances, Bancec should not be permitted to invoke the protection of American law entirely "free from the claims of justice." *National City Bank* v. *Republic of China, supra*, 348 U.S. at 362.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

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v.

BANCO PARA EL COMERCIO EXTERIOR DE CUBA,

Respondent.

ANSWER OF BANCO PARA EL COMERCIO EXTERIOR DE CUBA TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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Introduction

The government has misconceived in critical respects the decision of the court below and the record upon which it was made. As a result, its concern for the impact of that decision upon federal interests can readily be seen as misplaced and its proposed rule of law, whatever its merits, as inapplicable to this case. Further, the innovation the government would make in the law is, on its face, improperly and unnecessarily addressed to the judicial branch of government.

ARGUMENT

I

The Government Is Mistaken In Suggesting That The Court Of Appeals Failed To Consider Traditional Doctrines For Piercing The Corporate Veil.

In urging review and reversal of the Court of Appeals' judgment, the government first contends that the court

below refused to apply traditional legal doctrines for piercing the corporate veil to foreign state trading corporations. The government could not be wider of the mark. The Court of Appeals did not in any sense adopt a rigid rule that foreign law is dispositive of the status of such corporations except when the enterprise participated in the conduct complained of by the counterclaiming defendant. To be sure, the court discussed at some length *Banco Nacional De Cuba* v. *First National City Bank*, 478 F.2d 191 (2d Cir. 1973), which recognized such an exception. The court below did so because the district court in this case had erroneously relied upon that prior decision even though the plaintiff had nothing whatsoever to do with the seizure of the defendant's property. There is no intimation in the Court of Appeals' decision, however, that there is only one exception to what the government concedes to be the general rule of respecting the separate status of state trading enterprises. To the contrary, the Court of Appeals manifestly agrees that traditional *alter ego* doctrines may be invoked and has carefully scrutinized the record in this and related cases to determine their application.

Moreover, the possibility that the court below may have erred in its application of traditional principles to the particular record before it is hardly reason to grant the petition. There are a multitude of decisions every year adjudicating claims that a corporation's separate identity should be disregarded and the standards for resolving such claims are well established, if sometimes difficult of application. The court below is particularly experienced and respected in this area. *See, e.g., Kirno Hill Corp.* v. *Holt*, 618 F.2d 982 (2d Cir. 1980) (applying federal law); *Gartner* v. *Snyder*, 607 F.2d 582 (2d Cir. 1979) (applying New York law).

In the instant case, the court carefully drew the well-recognized distinction between commercial and governmental activities and found that the claim here arose entirely out of Bancec's normal commercial activities (12a-13a). In its review of the Foreign Sovereign Immunities

Act, 28 U.S.C. §1602, *et seq.*, the court noted those portions of the legislative history recognizing that normal substantive law might in certain circumstances hold one state enterprise liable for the acts of another (*e.g.*, when property held by one agency "is really the property of another") (12a-13a) and implicitly found that the record here did not present such circumstances. The court expressly found that the plaintiff was a trading corporation not merely created but "created *and operating* as a separate juridical entity. . ." (13a) (emphasis supplied).

For a full understanding of the court's decision, reference should also be made to *Banco Nacional de Cuba* v. *Chemical Bank New York Trust Co.*, 658 F.2d 903 (2d Cir. 1981), heard and decided by the same panel at the same time as the instant case. In *Chemical*, Banco Nacional asserted two claims: the first to recover funds in accounts it had long maintained for commercial transactions at the defendant bank, and the second to recover the funds in the accounts maintained at the defendant bank by nationalized private Cuban banks. The defendant bank had participated in loans to a company nationalized by the Cuban government, and counterclaimed for the outstanding amount due on those loans. Banco Nacional had not participated in the nationalization of defendant's debtor.

The Court of Appeals dismissed the counterclaim as asserted against Banco Nacional's first claim. It found that there was no basis for "imputing" to the Cuban government the ownership of accounts Banco Nacional had maintained "in the normal course of its commercial activities." However, it allowed assertion of the counterclaim against Banco Nacional's claim to the accounts maintained by the private Cuban banks. The court's detailed inquiry into the "nature and origin of [Banco Nacional's] claims as successor" to those banks under Cuban law lead it to the conclusion that "Banco Nacional must be viewed as pursuing those claims on behalf of the Cuban government" as its "tribute or agent". The Cuban government, the court held, was "the real party in interest." *Banco Nacional de Cuba* v. *Chemical Bank, supra* at 910-11.

In this case, as in *Chemical*, the Court of Appeals indeed rejected any notion that it should "willy-nilly" pierce the corporate veil because plaintiff was a state trading corporation (12a), just as it readily acknowledged that traditional doctrines of *alter ego*, real party in interest and agency are applicable to such corporations. This cannot be any cause for concern to the government, which refrains from asserting that the separate juridical status of state corporations should be disregarded as a general rule. Further, the court below expressly addressed factors which, the government argues, require particular scrutiny: whether the state corporation pursued commercial or governmental activities, whether it observed corporate formalities and whether, in fact, it conducted its business as a separate entity. Govt. Br., pp. 9, 14.[1]

The government additionally places some emphasis upon plaintiff's governing board being composed of representatives of various Ministries and upon the short duration of Bancec's corporate existence. We have addressed these contentions when first made by petitioner, Resp. Br., pp. 3-4, 11-12, and need add only a few observations.

First, the government does not suggest that these factors would be reason for piercing the corporate veil without an additional contention of a quite different character, discussed *post*, that Bancec was not a "stranger" to Cuba's expropriation program. If the petition is to be granted, it must be on the strength of this latter, unprecedented and unorthodox contention. Further, that government officials constitute the governing board of a state enterprise cannot be the basis for disregarding the corporation's separate juridical status unless most state enterprises are to be

[1] We note that the government inadvertently mischaracterizes the record by stating that the State "financed" Bancec. The Cuban government capitalized Bancec by transferring to it the capital of predecessor state corporations formed in the early 1950's. There is nothing to suggest that the Cuban government provided funds to Bancec after the initial capitalization or that it had any intention of doing so. Rather, the law establishing Bancec contemplated that the corporation would finance its activities from the profits it made on its commercial operations. Jt. App. 602-612.

considered the *alter egos* of the State. Moreover, traditional doctrines of *alter ego* do not look to the *possibility* of improper interference but to whether in fact control has been abused and the actual management of the corporation assumed. *See, e.g., Gartner* v. *Snyder, supra,* 607 F.2d at 586.

Similarly, the dissolution of a state corporation and its replacement with a successor corporation is hardly novel[2] and the government does not suggest any standard by which such events are to be considered excessive if repeated. In any event, there is nothing to support the government's uninformed and unsubstantiated suggestion (Govt. Br., p. 9) that Bancec's history was characterized by something other than pursuit of business purposes and observance of corporate formalities.[3]

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[2] See, *e.g.*, the history of the Export-Import Bank of the United States, 12 U.S.C.A. §635.

[3] Bancec's predecessor state corporation was created by government statute in 1954, a full five years before the Revolution. Jt. App. 613-26. As with Bancec, the State was its sole owner, contributed all its capital, received all its profits and the State's representatives constituted its governing board. (Although the law establishing Banco Cubano allowed for private, albeit minority, participation, the private sector never purchased shares of the corporation. Jt. App. 602). When the Republic created Bancec as the successor corporation it capitalized the new corporation by transferring the capital of Banco Cubano and another State corporation and provided that Bancec succeeded not only to the rights but the obligations of its predecessors. Further, it replaced Banco Cubano with Bancec for the stated purposes of ensuring greater functional autonomy, increased business initiative and expanded commercial operations. Jt. App. 602-3.

Subsequent developments had the same thrust. The continuity of capital from the predecessor to the successor corporations was preserved and the assumption of liabilities as well as assets was required. Further, the changes were undertaken in order to provide for greater specialization and efficiency in commercial operations. Bancec's international commercial banking functions were split off from its trade functions. After some experience indicated the need for still greater specialization, the activities of the new exporting corporation were divided among several corporations according to product. See the decrees appended to the Krinsky affidavit dated May 1, 1975.

II

The Government's Proposal For A Nationalization Exception To The Separate Entity Rule Is Without Foundation In The Record And Is Without Merit.

The government also maintains that the Court of Appeals erred in refusing to pierce the corporate veil because "the same government-directed expropriation program that injured Citibank" in violation of international law gave rise to the claim asserted by Bancec. It was by virtue of that expropriation program, the government states, that the Cuban government acquired the sugar subsequently exported by Bancec in the transaction at issue here. Govt. Br., p. 13. While it is not clear whether urged as an independently sufficient ground for review and reversal, this contention is at least a necessary element of the government's position. Govt. Br., pp. 11, 13.

A. Dispositively, the government has proceeded on an erroneous understanding of the facts. The sugar in question came from a sugar mill in Rio Cauto owned by the Cuban-Canadian Sugar Company, a corporation whose nationality and ownership are not disclosed by the record. By Resolution No. 127 of January 15, 1960, the National Institute of Agrarian Reform (INRA) intervened the Rio Cauto mill. ("Intervention" in Cuban law, as well as in the law of most American countries, is a process analogous to the establishment of a receivership in our courts.) The Resolution recites that the President of Cuban-Canadian had offered to sell the mill to INRA and had further advised INRA that it was unable to continue full operation of the mill. Stating that the mill's reduced production of sugar (Cuba's principal export crop) would cause economic disorder and labor conflicts, INRA decided for that reason to assume the management of the mill until the offer of sale had been studied and acquisition of the mill carried out. The Resolution was issued pursuant to a May 15, 1959 statute authorizing INRA to appoint interventors when necessary to prevent economic dislocation. There is absolutely nothing to cast doubt upon the Resolution's statement of the reasons for the intervention. See Stipulations before the trial court, Ct. Ex. 1, and Exs. C-E thereof.

The intervention of Rio Central was decreed seven months before issuance of Law No. 851, which authorized the first large-scale nationalization of United States-owned property, and nine months before the Cuban government first exercised that statute's authority to nationalize, among other United States-owned property, Citibank's branches. The courts of the United States have found, *Banco Nacional de Cuba* v. *First National City Bank*, 478 F.2d 191 (2d Cir. 1973), that Law No. 851 and the Resolutions issued thereunder were, on their face, in violation of international law because they expressly intended to retaliate against the United States government by nationalizing the property of its nationals, expressly discriminated against United States as distinct from other foreign nationals and offered a form of compensation which was illusory. It was pursuant to Law No. 851 that Cuba acquired the sugar at issue in *Banco Nacional de Cuba* v. *Sabbatino*, 27 F.R.D. 255 (S.D.N.Y. 1961), erroneously relied upon by the government.

There is no basis in the record for concluding that Cuban-Canadian was owned by United States nationals. Moreover, the Rio Cauto intervention and Law No. 851 are so different in character that it would be fanciful to maintain the two measures were part of the "same government-directed expropriation program." Nor is it possible to maintain that the intervention was in violation of international law.

B. Even if Bancec's claim and Citibank's injury in some manner had arisen from the same nationalization "program", no logical reason would be presented for disregarding Bancec's separate juridical status on that score. As we understand its brief, the government is not prepared to urge the wholesale abrogation of the separate entity rule even for nationalizing countries. Presumably for that reason, it seeks a nexus, however tenuous, between plaintiff and the loss suffered by defendant. However, when a state trading corporation merely acquires pursuant to contract property already nationalized by the government and sells it abroad, it is doing nothing more than perform-

ing a purely commercial function without any specific command of the government beyond the general direction of the statute of its creation to buy at home and sell abroad. There is no greater reason for disregarding its separate status in that situation than when the corporation is otherwise engaged in commercial activities pursuant to the same statutory purpose. Unlike when it participates in the seizure of property, the corporation is not performing a governmental function and is not acting as the agent of the sovereign.

Further, the government's proposal provides a clear "blueprint" to a foreign country for insulating its trade from nationalization claims. It would be easy enough for trading corporations to insist that foreign importers obtain the necessary letters of credit or other financing from banks without any property in the nationalizing country or which were not scheduled for nationalization. The United States government's remedy for the "blueprint" it perceives in the Court of Appeals' decision is no remedy at all.

C. The government's proposal is without precedent[4] and would take the judiciary well beyond its prior limits in investigating the nature of foreign political developments and passing upon their legality. In order to allow further proceedings on a counterclaim, a court would first have to determine whether a state trading corporation had been exporting property "expropriated" pursuant to the "same government-directed expropriation program" that injured the defendant and that this "program" was in violation of international law. Additionally, there are some intimations in the government's brief that its proposal is directed only at those countries which engage in "a general program of expropriation", Govt. Br., pp. 10-11. There simply are no "judicially discoverable and manageable standards

[4] We previously demonstrated that *National City Bank* v. *Republic of China*, 378 U.S. 356, provides no support even by way of analogy. Resp. Br., pp. 12-13. For the same reasons, *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, is inapposite. We also note that the government is in error in suggesting the latter decision established a counterclaim exception to the act of state doctrine.

for resolving" these questions. *Baker* v. *Carr*, 369 U.S. 186, 217.

Furthermore, the Court has been more than a bit hesitant and divided on when, if ever, federal courts may properly pass upon the validity of the nationalization of a defendant's property. *Banco Nacional de Cuba* v. *Sabbatino*, 276 U.S. 398; *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759. The government would have the courts inquire into the validity of additional, collateral nationalization measures simply to determine whether a nationalization counterclaim can be asserted against a particular plaintiff.

More generally, the government's proposal, divorced as it is from traditional legal principles, is a request for the Court to make and implement political decisions committed to other branches of government. We have made this point in our initial brief, pp. 9-11, in response to the nationalization exception urged by Citibank. That it is now the Executive which urges a comparable abrogation of established legal relations may make the policy arguments weightier but hardly less political in the Constitutional sense.[5]

One further point may be made to illustrate the political character of the government's position. Citibank argues that justification for disregarding plaintiff's separate corporate status may be found in the fact that when Cuba wished to retaliate for perceived grievances it had against the United States government, it nationalized United States corporations, paying no attention to the distinction in United States law between those corporations and the

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[5] The government's statement of its position here is not at all akin to Executive suggestions that the act of state doctrine need not be applied or Executive suggestions of sovereign immunity. As viewed by the proponents of affording such expressions great or dispositive weight, those are doctrines of judicial abstention from applying the rule of law in deference to the Executive's responsibility to conduct foreign relations. *See, First National City Bank* v. *Banco Nacional*, 409 U.S. 897, and *Alfred Dunhill of London* v. *Republic of Cuba*, 425 U.S. 682. Here, the Executive urges the Court to establish a particular substantive rule of law.

government. Pet. Reply Br., p. 4. Yet, Congress has rejected the very concept of retaliatory nationalization which the government in effect joins Citibank in urging the Court to achieve by disregarding the separate status of Cuban state corporations. In repealing a provision vesting blocked Cuban assets and providing for their distribution, P.L. 892, §5, 79 Stat. 1988 (Oct. 16, 1965), Congress was persuaded by the views of the State Department that:

> vesting and sale of Cuban property could set an unfortunate example for countries less dedicated than the United States to the preservation of rights . . . To vest and sell Cuban assets would place the Government of the United States in the position of doing what Castro has done. It could cause other governments to question the sincerity of the United States Government in insisting upon respect for property rights. The result could be a reduction, in an immeasurable but real degree, of one of the protections enjoyed by American-owned property around the world.

Sen. R. No. 701, Comm. on For. Rel., 89th Cong., 1st Sess. 2 U.S.C. Code Cong. & Admin. News p. 3583 (1965).

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
October 8, 1982

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented for Review

When, in the course of a revolution characterized by nationalization of private enterprise and unlawful confiscation of American property, a foreign state brings an action in a court of the United States through one of its wholly-owned and controlled organizations, and shortly thereafter dissolves that organization, shall a United States national, the defendant in the action, be denied the right to assert a counterclaim arising from the confiscation of his property, on the ground that the instrumentality in whose name the action was commenced was not the same instrumentality used by the state to effect the confiscation out of which the counterclaim arose?

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Pursuant to Sup. Ct. R. 28.1, a list of Petitioner's parents, subsidiaries and affiliates appears as Appendix E to the Petition.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FIRST NATIONAL CITY BANK,
Petitioner,

v.

BANCO PARA EL COMERCIO EXTERIOR DE CUBA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF

Opinions in the Courts Below

The opinion of the United States Court of Appeals for the Second Circuit is *Banco para el Comercio Exterior de Cuba* v. *First National City Bank*, 658 F.2d 913 (2d Cir. 1981) and is reproduced as Appendix A to the Petition. Pet. App. 1a-13a.[1] The opinion of the United States District Court for the Southern District of New York appears *sub nom. Banco Nacional de Cuba* v. *Chase Manhattan Bank*, 505 F. Supp. 412 (S.D.N.Y. 1980) and is reproduced in the Joint Appendix. Jt. App. 290-431.

Jurisdiction

The Court has jurisdiction to review the judgment of the court of appeals under 28 U.S.C. § 1254(1).

Statutes and Regulations Involved

Cuban Laws No. 793 of 1960 and No. 934 of 1961 are in Appendix D to the Petition. Cuban Laws No. 1425 of 1954, No. 851 of 1960, and No. 930 of 1961, as well as Resolution

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[1] The Appendix to the Petition will be referred to as Pet. App. and the Joint Appendix will be referred to as Jt. App.

No. 2 of 1960 and Resolution No. 1 of 1961, are in the Joint Appendix.

STATEMENT OF THE CASE

This action was brought on February 1, 1961 in the name of Banco para el Comercio Exterior de Cuba ("Bancec") against First National City Bank (now named and hereafter referred to as "Citibank").

Bancec, the named plaintiff, was a Cuban government instrumentality that was created by the Revolutionary Government of Cuba on May 4, 1960 and was dissolved by that government on February 23, 1961. Its capital was contributed by the Cuban government, its revenues were not taxed, and all of its income was paid to the Cuban government as "fiscal benefits" or accrued to the benefit of its sole owner, the Cuban government, as reserves. Jt. App. 38-39, 196. Its only shareholder was the Cuban state, and there is no indication that it had any creditors apart from the Cuban government or instrumentalities of that government.[2] Bancec was designed, among other things, to manage "the export of commodities for the account of the Government." Jt. App. 310. In the course of the discharge of its duties to the Cuban government, Bancec acquired from Instituto Nacional de Reforma Agraria ("INRA"), the state sugar monopoly, certain sugar which INRA had acquired as a result of the Cuban government's nationalization, or "intervention," of the plant of Cuban Canadian Sugar Company in Cuba. Bancec sold that sugar to Cuban Canadian, for whose account Citibank established, in favor of Bancec, an irrevocable letter of credit on August 18, 1960.

On or about September 15, 1960, Bancec's draft, together with shipping documents, was presented to Citibank by Banco Nacional, another Cuban government instrumentality, which purported to act as collection agent for Bancec in this transaction. The amount Citibank was called upon to pay was fixed at $193,280.30.

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[2] The nature, purposes and functions of Bancec are discussed in greater detail in Point II, below.

Meanwhile, on the night of September 15, 1960, the Cuban government, acting through its militia and Banco Nacional upon orders of Ernesto "Che" Guevara, set about the seizure of Citibank's eleven branches in Cuba and completed the seizure on September 16, 1960. The taking, without compensation, was held to be in violation of international law.[3] On or about September 21, 1960, Citibank advised Banco Nacional that the amount due under the Bancec letter of credit had been paid and that the amount so paid had been applied as an offset against Citibank's claims for the taking of its Cuban properties.

This litigation ensued. On February 1, 1961, Bancec commenced this action in the United States District Court for the Southern District of New York. Citibank's answer alleged that the action was brought "by and for the benefit of the Republic of Cuba by and through its agent and wholly-owned instrumentality, the plaintiff herein, which is in fact and law and in form and function an integral part of and indistinguishable from the Republic of Cuba." Jt. App. 113. By way of defensive counterclaim, the answer asserted Citibank's right of offset for the value of its eleven Cuban branches that were taken by the Cuban government, and for which no compensation was paid. Jt. App. 113-20.

The district court conducted a plenary trial and filed a lengthy opinion containing extensive findings of fact and conclusions of law. The district court specifically found that: (1) Bancec "lacked an independent existence, and was a mere arm of the Cuban Government, performing a purely governmental function" and was "an *alter ego* of the Cuban Government," 505 F. Supp. at 427, 428, Jt. App. 317-19; (2) "the devolution of the claim [against Citibank], however viewed, brings it into the hands of the Ministry [of Foreign Trade of the Government of Cuba], or Banco Nacional, each an *alter ego* of the Cuban Government," 505 F. Supp. at 425, Jt. App.

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[3] *See* the decisions in *Banco Nacional de Cuba* v. *First National City Bank* at 270 F. Supp. 1004, 1010 (S.D.N.Y. 1967) and 478 F.2d 191, 194 (2d Cir. 1973) (sometimes referred to along with the other opinions in the case as *"Citibank I"*).

310; and (3) the unrecovered value of Citibank's branches exceeded the amount demanded in the complaint. 505 F. Supp. at 467, Jt. App. 430. Judgment was entered dismissing the complaint. Jt. App. 432. On appeal, the court of appeals agreed with the district court's descriptions of Bancec's functions and its status as a wholly-owned instrumentality of the Cuban government, but concluded that Bancec was not an *alter ego* of the Cuban government for the purpose of the counterclaim. The court of appeals remanded the case to the district court for dismissal of Citibank's counterclaim. 658 F.2d at 917, 920, Pet. App. 8a, 13a. Citibank petitioned for a rehearing, which was denied. Citibank then petitioned for a writ of certiorari, which was granted by this Court.

SUMMARY OF ARGUMENT

1. Citibank's counterclaim is asserted to curtail a recovery sought by a foreign sovereign. In this case, the Republic of Cuba and Citibank are opposing parties. The fact that the action was brought in the name of Bancec is of no moment. During the brief period of its existence, Bancec functioned as an integral part of the Cuban government. The Cuban government exercised direct dominion over the claim asserted against Citibank. Cuban government instrumentalities carried out the taking of Citibank's property in violation of international law.

The right to counterclaim does not depend on identity of the transaction or occurrence out of which claim and counterclaim arise. The court below erred in its conclusion that, because Bancec was not the agency used by the Cuban government to commit the wrong upon which the counterclaim is based, Bancec was not an *alter ego* of the Cuban government for the purpose of the present counterclaim. That error should be corrected.

2. The findings of the district court as to the identity of the party seeking recovery in this case were findings of fact supported by ample evidence. The court of appeals exceeded its authority in setting aside those findings in order to reach a conclusion of law that is unsupported in fact or law. Unless

corrected, the decision of the court below works injustice in this case and disturbs the balance of trial and appellate court functions.

3. The transactions giving rise to this litigation were incidents of Cuba's program for the management and marketing of property that it had expropriated in violation of international law. In the administration of its program, the Cuban government created a variety of agencies, including governmental ministries, governmental bureaus, and governmental instrumentalities that were given purported juridical status. The designation of those units had no degree of permanence; their operation reflected no degree of independence. The transient character of Bancec and similar agencies precludes comparison with *bona fide* state trading companies. To accord such instrumentalities a status that the Cuban government itself did not respect impairs the interests of the United States and subverts principles declared by this Court.

ARGUMENT

I

THE COUNTERCLAIM WAS PROPERLY ASSERTED TO CURTAIL RECOVERY IN THIS CASE.

Citibank has valid claims against Cuba. This Court has determined that in a court of the United States these claims may be asserted to curtail recoveries sought by Cuba against Citibank. *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759 (1972); *National City Bank* v. *Republic of China,* 348 U.S. 356 (1955). The district court, after trial, properly identified Cuba as the party seeking recovery in this case.

In response to the Court's request for an expression of the views of the United States, the Solicitor General said:

> The decision of the court of appeals raises the narrow but important question of when the separate identity of an instrumentality of a foreign state should be disregarded to allow a counterclaim to be asserted against it based on the obligations of its parent state. In relying on a strong presumption favoring recognition of separate juridical status, the court of appeals has ignored other relevant considerations. It has given undue weight to the foreign state's self-serving declarations, while disregarding both the procedural status of this case and equitable factors that traditionally have been deemed relevant in analogous domestic law situations.

Brief of the United States as Amicus Curiae in support of Petition ("United States' Brief (Petition)") 8-9. In the context of claim and counterclaim, the question may be raised in another form: is the propriety of asserting a counterclaim to be tested by the derivation or by the devolution of the claim to which it is opposed?

On the basis of the evidence adduced at a plenary trial, the district court concluded that Bancec was "an *alter ego* of the Cuban Government" whose pretension of separate identity should be disregarded for purposes of the litigation, and that, "however viewed," the devolution of the claim brought it

into the hands of the Cuban government. 505 F. Supp. at 425, 428, Jt. App. 310, 319. The undisputed evidentiary facts led inevitably to the determination that in the circumstances of this case Citibank's defensive counterclaims were properly asserted.

During its brief existence, Bancec was clearly an *alter ego* of the Cuban government. Apart from its statutory "designation" as an "autonomous" juridical person, it was no different from any other department, ministry, bureau or section of the Revolutionary Government of Cuba.[4] The court of appeals appears not to have questioned that fact; it said only that Bancec was not an *alter ego* of the Cuban government "for the purposes of the present litigation" because Bancec was not the instrumentality used by Cuba to effect the physical seizure of Citibank's property. 658 F.2d at 919, Pet. App. 11a.

Whether or not Bancec had a separate identity capable of respect, the Cuban government was the beneficial owner of the claim on which recovery is sought in this action, and it assumed direct ownership when, three weeks after commencement of the action, it dissolved Bancec and retrieved the assets lodged with it. As the district court found, and the court of appeals recognized, upon the dissolution of Bancec the claim was lodged with either Banco Nacional de Cuba or the Cuban Ministry of Foreign Trade, each an *alter ego* of the Cuban Government.[5] 505 F. Supp. at 425, Jt. App. 310; 658 F.2d at 916 n.4, 918; Pet. App. 4a n.4, 10a.

The purpose of a counterclaim is to facilitate resolution of the entire controversy between the parties to an action. Nowhere does it serve that purpose more effectively than in

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[4] *See* footnote 5, below.

[5] Banco Nacional de Cuba was found to be an *alter ego* of Cuba for purposes of Citibank's counterclaims in *Citibank I*, 478 F.2d at 193. It has long been settled that government ministries or departments are *alter egos* of the government. *Hawaii* v. *Gordon*, 373 U.S. 57, 58 (1963); *Mine Safety Appliances Co.* v. *Forrestal*, 326 U.S. 371, 373-75 (1945); *Runkle* v. *United States*, 122 U.S. 543, 556-57 (1887); *Wolsey* v. *Chapman*, 101 U.S. 755, 769 (1879).

cases such as this when it is used as an offset to net out the balance of accounts between the owners of the respective claims. The effectiveness of the procedure is no longer impeded by limiting consideration to claims and counterclaims that arise from a single transaction. Fed. R. Civ. P. 13(b). Neither is adjudication frustrated by attempts to conceal the identity of the litigants. This Court has upheld the "equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when so to do would work fraud or injustice." *Taylor* v. *Standard Gas & Electric Co.*, 306 U.S. 307, 322 (1939). Discussing some of the factors that justify disregard of the corporate fiction, the Court has observed:

> That is not a complete catalogue. The several companies may be represented as one. Apart from that is the question whether in fact the economic enterprise is one, the corporate forms being largely paper arrangements that do not reflect the business realities. One company may in fact be operated as a division of another; one may be only a shell, inadequately financed; the affairs of the group may be so intermingled that no distinct corporate lines are maintained. These are some, though by no means all, of the relevant considerations, as the authorities recognize.

NLRB v. *Deena Artware, Inc.*, 361 U.S. 398, 403-04 (1960); *accord, Consolidated Rock Products Co.* v. *Du Bois*, 312 U.S. 510, 523-24 (1941); *Pepper* v. *Litton*, 308 U.S. 295, 310 (1939); *Davis* v. *Alexander*, 269 U.S. 114, 117 (1925).

Foreign states and their instrumentalities enjoy no exemption from the application of American law when they are properly before a court of the United States. An entity which succeeds to the assets and liabilities of a dissolved corporation becomes the real party in interest in litigation in which that corporation was a party prior to its dissolution. *DeVilliers* v. *Atlas Corp.*, 360 F.2d 292, 297 (10th Cir. 1966); *see generally* 15 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 7180 (rev. perm. ed. 1973). The successor thereby exposes itself to any claims or counterclaims which

the opposing party in the litigation may have against it. Fed. R. Civ. P. 13(b), 17(a); *see Automatic Dialing Corp.* v. *Maritime Quality Hardware Co.*, 98 F. Supp. 650, 652 (D. Maine 1951); *see generally* 6 C. Wright and A. Miller, *Federal Practice and Procedure* §§ 1420, 1421, 1543 (1971). Accordingly, having explicitly dissolved Bancec and having reassigned the plaintiff's claim in this action to itself, Cuba may not be heard to suggest that Citibank's counterclaim against it is invalid.

The court of appeals' restriction on the interposition of counterclaims against foreign governments would vitiate decisions of this Court which have sustained such counterclaims against attack based on theories of sovereign immunity and act of state. *National City Bank* v. *Republic of China*, 348 U.S. 356 (1955); *Citibank I*, 406 U.S. 759 (1972). The United States has aptly described the impact of the court of appeals' decision:

> The court of appeals' decision threatens to undermine . . . important federal interests. The decision provides to foreign governments contemplating expropriation a blueprint on how to insulate their instrumentalities from liabilities that might otherwise be adjudicated in the United States courts. Under the court of appeals' holding, an instrumentality of an expropriating state will be shielded from liability so long as the instrumentality does not play a direct and substantial role in the expropriation. Accordingly, governments contemplating expropriation may protect themselves from liability in American courts simply by ensuring that their instrumentalities with assets or claims in the United States do not play a "key role" in the expropriation.

United States' Brief (Petition) 7-8.

In *Republic of China*, this Court declared the principle that when a foreign state enters our courts as a suitor, it waives its immunity from adjudication of claims against it which, if valid, would curtail its recovery. Such counterclaims need not arise out of the transaction on which the

state's claim is based. Justice Reed, in dissent, summarized the majority holding:

> Here we have an entirely disconnected claim on overdue national notes brought forward as a defense to an action to recover a bank deposit. The Court recognizes that the counterclaim is not related to China's cause of action against the City Bank. It says:
>
> > "The point is that the ultimate thrust of the consideration of fair dealing which allows a setoff or counterclaim based on the same subject matter reaches the present situation."

348 U.S. at 366, 372 (Reed, J., dissenting).

The only discernible distinction is that in *Republic of China* the action was brought and prosecuted in the name of the real party in interest, while in this case Cuba, which sought and obtained leave to be substituted for Bancec, has found it expedient to abandon its own request to be substituted as plaintiff and to assert the fiction that the party seeking recovery is a state banking and trading corporation that ceased to exist more than 20 years ago. (See discussion at 17-18, below.) That pretense is contradicted by the statute under which Cuba owned and dominated Bancec, as well as by the statutes under which it dissolved Bancec and under which the claim here devolved to Cuba. The trial judge recognized the insubstantiality of Cuba's contention, finding that "the devolution of the claim, however viewed, brings it into the hands of the Ministry [of Foreign Trade] or Banco Nacional, each an *alter ego* of the Cuban Government." 505 F. Supp. at 425, Jt. App. 310.

The court of appeals placed reliance on the origin of Bancec's claim, to which Cuba succeeded under Law No. 930, saying, "the claim is a purely commercial one having no connection with the revolution or the expropriations. . . ." 658 F.2d at 919, Pet. App. 11a. However, in *Republic of China,* the claim was also a "purely commercial one," namely a claim for a debt allegedly owed by Citibank. The debt had no connection with the breach of obligation by the Chinese government that led Citibank to refuse payment of a deposit

made by the Shanghai-Nanking Railway, for which China sued as successor in interest.

In *Citibank I*, this Court held that Citibank's claims against Cuba were justiciable, notwithstanding the act of state doctrine. 406 U.S. at 769. The court of appeals held, on remand, that the claim against Cuba was valid and could be asserted notwithstanding that the action was brought in the name of Cuba's juridically "separate" instrumentality, Banco Nacional. 478 F.2d at 193-94.

Republic of China and *Citibank I* establish the basic principle that neither sovereign immunity nor the act of state doctrine bars otherwise cognizable counterclaims by U.S. citizens against foreign governments or their instrumentalities. The decision of the court below would reverse the thrust of the decisions of this Court in *Republic of China* and *Citibank I*. Unless corrected, it suggests that the rules of *Republic of China* and *Citibank I* apply only in the improbable circumstance in which the entity chosen to assert the claim participated directly in the confiscation giving rise to the counterclaim. The court of appeals' decision would signal a simple method of evasion of cognizable counterclaims.

Such methods of evasion are not countenanced by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-11 (1976) ("Immunities Act"). The purpose of the Immunities Act was to lower "the barrier of immunity" enjoyed by a foreign state that is sued in a court of the United States. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6605 ("House Report"). The Immunities Act states that "[i]n any action brought by a foreign state [which is defined in 28 U.S.C. § 1603(a) to include the foreign state's agency or instrumentality] . . . the foreign state shall not be accorded immunity with respect to any counterclaim . . . to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state." 28 U.S.C. § 1607(c). The legislative history of the Immunities Act makes it clear that section 1607(c) was intended to codify the rule of *Republic of China* and to

authorize setoffs not arising from the same transaction upon which the plaintiff sues, as is required under section 1607(b). House Report at 23, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6622. It is also clear that any strictures against the scope of allowable counterclaims in the Immunities Act are substantially reduced in cases in which the foreign state has expropriated the U.S. counterclaimant's property. *See* 28 U.S.C. §§ 1605(a)(3) and 1610(a)(3); House Report at 19, 28, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6618, 6627.

The draftsmen of the statute emphasized that the Immunities Act was not intended to affect the substantive rights and liabilities of the parties:

> The bill is not intended to affect the substantive law of liability. Nor is it intended to affect . . . the attribution of responsibility between or among entities of a foreign state; for example, whether the proper entity of a foreign state has been sued, or whether an entity sued is liable in whole or in part for the claimed wrong.

House Report at 12, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6610.

The decision of the court below thus reverses not only the thrust of the decisions of this Court in *Republic of China* and *Citibank I,* but also the congressional mandate in the Immunities Act. Far from lowering the barrier of immunity accorded to foreign sovereigns, the decision of the court below would erect a new barricade behind which those foreign states that are sufficiently sophisticated could seek shelter to manipulate American law for their own purposes.

In these circumstances, the counterclaim was proper notwithstanding that it was based on a different transaction or occurrence from that which gave rise to the main claim. That is the result dictated by American law, and that result should obtain whether the complainant is a private company, or one or more of the instrumentalities of a foreign state.

It was manifest error for the court of appeals to dismiss Citibank's counterclaim.

II

THE TRIAL COURT'S FINDING THAT BANCEC WAS IDENTICAL TO THE CUBAN GOVERNMENT FOR PURPOSES OF THIS CASE IS SUPPORTED BY AMPLE EVIDENCE AND SHOULD NOT HAVE BEEN SET ASIDE.

The district court found as a fact, after a plenary trial and on ample evidence, that Bancec and Cuba were identical for purposes of this case. The district court made that factual determination after review of Cuban statutes, live testimony and a stipulation by the parties, all demonstrating that Bancec and Cuba were interchangeable. That finding should not have been disregarded by the court of appeals.

Federal Rule of Civil Procedure 52(a) provides that "findings of fact shall not be set aside unless clearly erroneous." Under this rule, an appellate court is not authorized to review a record *de novo, Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969), and may not set aside the finding of a trial court because, on the same evidence, the appellate court might have reached a different result. *Id.; United States* v. *National Association of Real Estate Boards*, 339 U.S. 485, 495-96 (1950). A finding is "clearly erroneous," such that its disregard is warranted, only when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). The findings of a trial court are presumptively correct, and the burden is on the appellant to persuade a reviewing court that a finding was clearly erroneous. *J.A. Jones Construction Co.* v. *Englert Engineering Co.*, 438 F.2d 3, 5 (6th Cir. 1971).

The determination of identity among entities is a finding of fact subject to the clearly erroneous rule. In the words of one court, "The question of whether a corporation is an instrumentality or an *alter ego* of another corporation presents primarily an issue of fact to determine upon the basis of the facts of each individual case. The clearly erroneous rule set forth in Fed. R. Civ. P. 52(a) applies." *National*

Bond Finance Co. v. *General Motors Corp.*, 341 F.2d 1022, 1023 (8th Cir. 1965) (citations omitted).[6]

The district court found as a fact that Bancec and Cuba were identical for purposes of this litigation. The Cuban government created Bancec to effectuate, in the area of foreign trade, the "reorganization of the credit institutions of the State undertaken by the Revolutionary Government for the purpose of effectively serving the broad program of agricultural and industrial development of the nation." Law No. 793, Recitals, Jt. App. 36. Bancec's express purpose was "to contribute to, and collaborate with, the international trade policy of the Government and the application of the measures concerning foreign trade adopted by the 'Banco Nacional de Cuba' . . . [for] reasons of national convenience." *Id.*, art. 1, para. VIII, Jt. App. 39-40. Its function was to "collaborate with its technical and financial assistance to make feasible in foreign markets the plans adopted by the Revolutionary Government or the 'Banco Nacional de Cuba' for the expansion of commercial interchange or directly to carry forward the pertinent operations." *Id.*, para. IX(a), Jt. App. 41. Virtually all of the Cuban government's purposes and powers in respect of foreign banking and trade were embodied in the list of Bancec's "purposes and powers," and Bancec was the government's delegate in their execution. *Id.*, para. VIII(a)-(k), Jt. App. 39-41.

Moreover, Cuba owned all of Bancec's equity. The funds necessary for Bancec's operations were allocated to it by the Cuban government. *Id.*, para. IV, Jt. App. 38. All of Bancec's net income was paid to the Cuban government as

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[6] *See also Leach Co.* v. *General Sani-Can Manufacturing Corp.*, 393 F.2d 183 (7th Cir. 1968) (an *alter ego* determination is a finding of fact subject to the clearly erroneous rule); *In re Eufaula Enterprises, Inc.*, 565 F.2d 1157, 1160-61 (10th Cir. 1977) (finding by referee in bankruptcy, adopted by district court, that public trust was the instrumentality or *alter ego* of debtor, not to be set aside unless "clearly erroneous"); *Astron Industrial Associates, Inc.* v. *Chrysler Motors Corp.*, 405 F.2d 958, 961 (5th Cir. 1968) (determination of identity of privies for purpose of *res judicata* is a question of fact to which the clearly erroneous standard applies).

"fiscal revenue . . . deposited in the General Treasury of the Republic." *Id.*, para. V, Jt. App. 39.

Bancec was the Cuban state's exclusive purchasing and banking agent in foreign commerce, acting as "the central import office of the State," and was exclusively responsible for handling all purchases, financial and foreign exchange operations of the Cuban state and its provinces and municipalities. *Id.*, art. 2, Jt. App. 52-53. Bancec held a government monopoly on Cuba's foreign trade; an importer or exporter had no choice but to sell or purchase his product through Bancec, as Raul Lopez, a lawyer in the Cuban Ministry for Foreign Trade, testified at trial. Jt. App. 201.

During the brief period when it was purportedly accorded status as a juridical person, Bancec's activities were directed and supervised by the Cuban government. Any deviation from its assigned functions could occur only when "expressly decided by the Council of Ministers." Law No. 793, art. 2, Jt. App. 53. Its president, chief executive officer and president of its board of directors was Che Guevara, who was concurrently president of Banco Nacional de Cuba and Cuba's Minister of State. *Id.*, art. 1, paras. XI, XIV, Jt. App. 46-49. Bancec's "Governing Board" ("the supreme body of [Bancec] . . . vested with the broadest powers to dispose of its personal and real properties") was "presided ex officio by the President of the 'Banco Nacional de Cuba' and . . . composed of a Delegate of the Minister of Commerce, a Delegate of the Minister of Economy, a Delegate of the National Agrarian Reform Institute (INRA) and a Delegate of the Department of Mines and Petroleum of the Ministry of Agriculture." *Id.*, para. XI, Jt. App. 46-48.

Cuba owned the sugar which is the subject matter of this lawsuit. Evidence adduced at the trial shows that Bancec had acquired the sugar from INRA, which, in turn, had acquired the sugar upon the Cuban government's nationalization or "intervention" of the Rio Cauto mill, a property formerly owned by Cuban Canadian Sugar Company.[7] Resolution No.

[7] Numerous courts have recognized that intervention and nationalization were the same thing in Cuba. *See, e.g., Menendez*

127, Jt. App. 33. At the time of the transaction, Cuba had "nationalized the properties of corporations engaged in the business of manufacturing sugar and thus, according to its own allegations, became the owner of all sugar. . . ." *Banco Nacional de Cuba* v. *Sabbatino*, 27 F.R.D. 255, 258 (S.D.N.Y. 1961); *see also* Cuban Law No. 851, Jt. App. 57-61. Thus, the transaction that gave rise to this litigation was an implementation of the Cuban government's program for managing and marketing expropriated property, in which Bancec acted like any department, bureau or section of the Cuban government. The district court found that Bancec "had no function to fulfill, except to manage the export of commodities for the account of the Government." 505 F. Supp. at 425, Jt. App. 310.

Upon the dissolution of Bancec, some three weeks after commencement of this case, all of its assets, including the claim in this case, reverted to direct ownership by the Cuban government, which took and exercised dominion over them. Law No. 930, paras. 3, 5, Jt. App. 103-05. As the district court found, Cuba thereafter assigned to Banco Nacional those rights, claims and assets that were "peculiar to the banking business." 505 F. Supp. at 424, Jt. App. 307; Law No. 930, para. 5, Jt. App. 105. The court of appeals has held, and has reaffirmed in this case, that Banco Nacional was an *alter ego* of the Cuban government. *Citibank I*, 478 F.2d at 193; 658 F.2d at 918, Pet. App. 10a. Cuba assigned the rest of Bancec's assets to the Ministry of Foreign Trade. Law No. 934, Pet. App. 16d, 18d. As the district court explained, "[t]he Ministry of Foreign Trade is no different than the Government of which its minister is a member." 505 F. Supp. at 425, Jt. App. 310. In the words of the district court, "the

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v. *Saks & Co.*, 485 F.2d 1355, 1360-61 (2d Cir. 1973), *rev'd on other grounds, sub nom. Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 685-86 (1976); *Tabacalera Cubana, S.A.* v. *Faber Coe & Gregg, Inc.*, 379 F. Supp. 772, 773-74 (S.D.N.Y. 1974); *F. Palicio y Compania, S.A.* v. *Brush*, 256 F. Supp. 481, 483-84, 487-88 (S.D.N.Y. 1966), *aff'd per curiam*, 375 F.2d 1011 (2d Cir.), *cert. denied*, 389 U.S. 830 (1967). The district court so found in this case. 505 F. Supp. at 419-20, Jt. App. 296-97.

devolution of the claim, however viewed, brings it into the hands of the Ministry, or Banco Nacional, each an *alter ego* of the Cuban Government." 505 F. Supp. at 425, Jt. App. 310.

Cuba continued to create and recreate instrumentalities, assigning and reassigning the claim of then-defunct Bancec as suited its immediate purpose. On March 1, 1961, Cuba created Empresa Cubana de Exportaciones, and lodged the claim there. Resolution No. 1 under Law No. 934, Pet. App. 25d, 26d. Ten months later, Cuba dissolved Empresa Cubana de Exportaciones and created Empresa Cubana Exportadora de Azucar y sus Derivados ("Cubazucar"), and lodged the claim there. Jt. App. 136.

Respondent itself recognized that Bancec and Cuba were identical for purposes of this claim. On July 6, 1961, at the instigation of respondent, and as the respondent's first substantive act after Bancec's dissolution, the parties entered into a stipulation in which respondent "represented" that, by operation of Cuban law, "plaintiff has been dissolved" and that "the claim of the [respondent] involved in this proceeding has been transferred to a newly created Ministry of Foreign Trade of the Republic of Cuba." Jt. App. 123. In light of these representations, the parties agreed to the following:

> It is Hereby Stipulated, that pursuant to Rule 25-c of the Federal Rules of Procedure, the Republic of Cuba may be substituted in the place and stead of plaintiff in the above action. . . .

Id. At the instigation of respondent, the parties stipulated to the very fact that is in issue here—that in this case Bancec and Cuba are interchangeable.

The parties stipulated further that "plaintiff may serve and file a supplemental complaint" in the form that was annexed to the stipulation. Jt. App. 124. That complaint named the Republic of Cuba as the plaintiff in the case and stated that "certain of [Bancec's] assets and liabilities including the claim which is the subject of this action, were assumed by plaintiff [Cuba]." Jt. App. 125.

This substitution of plaintiffs and assumption of the claim by Cuba was explicitly approved by the district court, which, after review, "so ordered" its terms on July 7, 1961.[8]

After trial, the district court found that, "[u]nder all of the relevant circumstances shown in this record," with "[n]o factual or legal basis" to distinguish between Cuba's instrumentalities, "it is clear that Bancec lacked an independent existence, and was a mere arm of the Cuban Government, performing a purely governmental function." 505 F. Supp. at 427, Jt. App. 316-17.

The court of appeals did not dispute these findings but, instead, rejected what it denominated the district court's "conclusions." According to the panel of the court below, "While we agree with the district court's descriptions of Bancec's functions and its status as a wholly-owned instrumentality of the Cuban government, we reject its conclusions." 658 F.2d at 917, Pet. App. 8a.

Such disregard of a factual finding impairs the function of a trial court, whose purpose is to make findings on the basis of evidence received and weighed by it. As this Court has observed, determinations by a trial court depend "ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case." *Commissioner* v. *Duberstein*, 363 U.S. 278, 289 (1960). Moreover, denial of the trial court's role

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[8] To insure the integrity of the judicial process, respondent should be estopped from denying its prior allegations in the same lawsuit. *Davis* v. *Wakelee*, 156 U.S. 680, 689 (1895) ("It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter simply because his interests have changed, assume a contrary position. . . ."); *Scarano* v. *Central Ry. Co.*, 203 F.2d 510, 513 (3d Cir. 1953) (The adoption of inconsistent positions would "most flagrantly exemplify that 'playing fast and loose with the courts' which has been emphasized as an evil the courts should not tolerate. . . ." This is "more than an affront to judicial dignity," it is "a means of obtaining unfair advantage in a forum provided for suitors seeking justice."). On these facts and under equitable principles, the court of appeals' disregard of the fact to which plaintiff itself agreed is improper.

usurps the essential function of the fact-finder, impairs public confidence in trial courts, multiplies appeals, and improperly engenders additional expense and delay in the administration of the judicial system. 9 C. Wright and A. Miller, *Federal Practice & Procedure* § 2587, at 748 (1971); *Pendergrass* v. *New York Life Insurance Co.*, 181 F.2d 136, 138 (8th Cir. 1950).[9]

The intrusion of the court of appeals upon the district court's fact-finding function was unjustified in this case, which has been administered by the district court for over twenty years and in which the district court's findings, after a plenary trial, are supported by overwhelming evidence that the district court carefully and conscientiously weighed. To restore the balance of trial and appellate court functions, and in fairness to the litigants, the finding of the trial court that Bancec and the Cuban government were identical for purposes of this case should not be set aside.

III

THE DECISION OF THE DISTRICT COURT RESPECTS THE CONCERNS OF UNITED STATES LAW AND FOREIGN POLICY.

The Executive Branch, which is charged by the Constitution with the conduct of foreign policy, has declared that the court of appeals' decision threatens to undermine the important federal interest in protection of overseas commerce and investment, and maintenance of legal standards and procedures for that purpose. The Legislative Branch, as

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[9] *See also* scholarly discourse critical of the erosion of the clearly erroneous rule: C. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751 (1957); J. Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous Rule" Being Avoided?*, 59 Wash. U. L.Q. 409 (1981); Note, *Federal Rule of Civil Procedure 52(a) and the Scope of Appellate Fact Review: Has Application of the Clearly Erroneous Rule Been Clearly Erroneous?*, 52 St. John's L. Rev. 68 (1981). *But see* P. Carrington, *The Power of District Judges and the Responsibility of Courts of Appeal*, 3 Ga. L. Rev. 507 (1969).

noted by the Solicitor General, has enacted statutes to further that interest; and to assist in achieving those objectives the United States has an extensive network of commercial treaties and agreements that prescribe standards and procedures. United States' Brief (Petition) 7. The policies declared by the Executive and Legislative Branches are supported by and consistent with principles of fair dealing and equity enunciated by the Judicial Branch. (*See* Point I, above.) The assertion of the counterclaim in this case is proper under prior decisions of this Court and consistent with the foreign policy of the United States. The legitimate interests of *bona fide* state trading companies are not infringed by such counterclaims.

Separate juridical status does no more than create a rebuttable presumption of independence. The presumption is rebutted by a demonstration that the purported entity is so dominated by the government that it has no function other than the execution of governmental policies. The issue must be resolved in the context in which it arose. In this case Bancec and its sibling instrumentalities were, in effect, no more than embryonic entities which, like Bancec, were aborted before they reached full term. From the time of their conception until their dissolution, they were inseparable from the matrix of governmental structure and function.

The events that gave rise to this litigation, and which framed the issues, occurred more than two decades ago in the context of what Cuba itself has characterized as a revolution. As noted in the brief of the United States:

> Foreign states may have unfettered power to create, dissolve, and control subsidiary corporations, and to assign their assets and liabilities, free from traditional legal constraints and without attention to corporate formalities. Foreign states also may use subsidiary corporations or instrumentalities not only for business purposes, but also for the execution of government policies.

United States' Brief (Petition) 9.

The Revolutionary Government of Cuba disdained such traditional legal constraints as respect for the independence of juridical persons. In the execution of its program of retaliation against the government of the United States, the Revolutionary Government of Cuba confiscated private American property, including that of Citibank. Notwithstanding the indisputably independent juridical status of the deprived enterprises, Cuba made no pretense of obeisance to the principle of autonomy and separation of entities upon which it bases its position in this case.

Cuba demonstrated no greater respect for its own organizations upon which it conferred purported juridical status. It had seized all property within its grasp and was experimenting with respect to managing and marketing that property. The instrumentalities it used for that purpose, whether or not denominated juridical entities, were created, altered and dissolved solely for the administrative convenience of the government of which they were admittedly integral parts.

The contrast between *bona fide* enterprises and the transient enterprises spawned by a revolution is illustrated by Che Guevara, one of the architects of Cuba's revolutionary program. Sr. Guevara described the nature of "agrarian reform" in Cuba, through which, among other things, Cuba became the owner of the sugar at issue herein:

> Allow me to make a short resume of what was done in Cuba in 1959. . . .
>
> The old ministries were caves full of bureaucrats and parasites. . . . We had to change the structures, and we began to do so, without a plan, without proposing any, or almost. The revolutionary group, with Fidel Castro at the head, issued first of all the Agrarian Reform Law. . . .
>
> The big landowners, many of whom were North Americans, immediately sabotaged the Agrarian Reform Law. . . . But since we were already advancing, we did so then in depth, violently. And what we could have imagined as an agrarian reform of bourgeois value,

> which would have given land to poor peasants, was transformed into a violent struggle, in the course of which were expropriated, without any compensation, all the lands of the big latifundists of Cuba.

C. Guevara, "On the Cuban Experience" (1963) in *Venceremos! The Speeches and Writings of Ernesto Che Guevara* 257, 258-59 (Gerassi ed. 1968) (hereafter "*Venceremos!*").

Finance, industry and foreign commerce were similarly declared to be subject to the government's exclusive dominion:

> The superstructure of the neocolonial state was intact; we had to work to destroy it and to rebuild our society on new bases. The financial agencies of the government were in the hands of future traitors. . . .
>
> . . . .
>
> . . . More than 90 percent of industry was nationalized. *All foreign commerce was monopolized by the state.*

Id. (emphasis added). Bancec was identified as an executor of the Cuban state's policies:

> Our foreign commerce has totally changed directions, geographically. . . . [E]conomically we needed a more complete organization. Before, hundreds of specialized importers asked for their products from the United States, and the next day, they arrived by ferryboat directly from Miami. In between there were neither stores nor warehouses.
>
> All this system, without the specialists—enemy of the government—now had to melt itself into the Bank of Foreign Commerce [Banco para el Comercio Exterior de Cuba].

Id. at 261. Sr. Guevara's contemporaneous description is consistent with that furnished by the district courts in this and related cases. 505 F. Supp. at 419-28, Jt. App. 293-97; *Citibank I*, 270 F. Supp. at 1005-10.

The transient organizations created by Cuba during the Revolutionary Government's early years bore no resemblance to and cannot be equated with state-owned business corporations that operate in accordance with the legal standards and procedures of international commerce. Cuba's early governmental instrumentalities were assigned the task of turning to account property expropriated by Cuba; in this case Bancec was, among other things, the instrumentality used to dispose of expropriated sugar, just as Banco Nacional was the instrumentality used to manage expropriated banking properties. 478 F.2d at 193. The contrast to the function of bona fide state trading companies is marked by the trial examination of respondent's witness, Raul Lopez, a Cuban government lawyer, as to the ostensible conformity of current Cuban practice with that of Eastern European and other socialist countries.[10]

In the regular course of business, the independent juridical status of legitimate state trading companies is important to those who deal with them in reliance on the availability of their assets to satisfy commercial claims. J. Quigley, *The Soviet Foreign Trade Monopoly* 119 (1974). In this case, there is no indication that Bancec had any creditors who might claim against the assets that the Cuban government recaptured in 1961. Certainly such assets in Cuba were unreachable by United States citizens. The court of appeals recognized that any assets accruing to Bancec in this case were to be treated as assets of Cuba for the purpose of claims settlement. 658 F.2d at 920, Pet. App. 13a. The considerations appropriate to issues involving established and extant state trading companies have no application to this case.

In the early days of the Revolutionary Government of Cuba, Bancec and other experimental models that were tried and rejected had no juridical personality. They were exercises in governmental organization, and as such did not operate as juridical entities. In the circumstances of this case, their corporate coloration should be disregarded. The courts

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[10] "Mr. Harfield: You are inquiring now, Mr. Rabinowitz, as to the circumstances today and not in 1960? Mr. Rabinowitz: Yes. Mr. Harfield: The record will show that." Jt. App. 194.

of the United States have done so, in appropriate circumstances, with respect to United States government corporations. As this Court said in *Inland Waterways Corp.* v. *Young*, 309 U.S. 517, 523-24 (1940):

> [T]he form which Government takes—whether it appears as the Secretary of the Treasury, the Secretary of War, or the Inland Waterways Corporation—is wholly immaterial. The motives which lead Government to clothe its activities in corporate form are entirely unrelated to the problem of safeguarding governmental deposits, and therefore irrelevant to the issue of *ultra vires*.... The true nature of these modern devices for carrying out governmental functions is recognized in other legal relations when realities become decisive. The funds of these corporations are, for all practical purposes, Government funds; the losses, if losses there be, are Government losses.

Accord, Federal Crop Insurance Corp. v. *Merrill*, 332 U.S. 380, 383-84 (1947); *Emergency Fleet Corp., United States Shipping Board* v. *Western Union Telegraph Co.*, 275 U.S. 415, 422-24 (1928); *United States* v. *County of Iowa*, 295 F.2d 257, 258 (7th Cir. 1961); *see also Kingdom of Sweden* v. *New York Trust Co.*, 197 Misc. 431, 440-41, 96 N.Y.S.2d 779 (Sup. Ct., N.Y. County 1949) (Swedish government held to be proper party on claim based upon contract between United States citizen and Swedish government-owned bank).

Now, as in 1960-61, there is evidence to support Citibank's contention that Bancec and its ilk were used by Cuba to erect a barrier behind which it could shelter its effort to manipulate American law for its own purposes. The United States has stated that the decision of the court below "provides to foreign governments contemplating expropriation a blueprint on how to insulate their instrumentalities from liabilities that might otherwise be adjudicated in the United States courts." United States' Brief (Petition) 7.[11]

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[11] Respondent disagrees. In its reply to that brief, it observes: "It would be easy enough for trading corporations to insist that foreign importers obtain the necessary letters of credit or other

The signal that such artifices will be employed emphasizes that the court of appeals' decision undermines existing policies and programs of the United States, embodied in legislative mandate and executive practice. The United States has sequestered property in this country of the government and nationals of Cuba. Cuban Assets Control Regulations, 31 C.F.R. Part 515 (1980); *see* 22 U.S.C. §§ 1643-43k (1976); *see also Sardino* v. *Federal Reserve Bank*, 361 F.2d 106 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966). Whether private property so sequestered will be applied to the satisfaction of the claims of United States nationals is an open question. There is no question as to the liability to such application of the property of the Cuban government, including its instrumentalities, whether or not they have independent juridical status. The court of appeals gave tacit recognition to that fact in this case (658 F.2d at 920, Pet. App. 13a), and in its contemporaneous decision in *Banco Nacional de Cuba* v. *Chemical Bank New York Trust Co.*, 658 F.2d 903 (2d Cir. 1981), when it ordered that the amounts awarded to the Cuban plaintiffs be deposited together with other frozen Cuban assets for the potential benefit of any U.S. claimants—many of whom never dealt with Bancec.

The district court correctly observed that the realities of the situation should control, whether the instrumentality of the foreign state is a Potemkin Village, as was Bancec, or a genuine entity employed by the foreign state in a governmental program. Fact and function are determinative. The accuracy of the district court's findings as to fact and function was conceded by the court of appeals. 658 F.2d at 917, Pet. App. 8a.

The judgment of the district court should be affirmed.

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financing from banks without any property in the nationalizing country or which were not scheduled for nationalization." In short, Cuba need not rely on the court of appeals' "blueprint," which the United States decries, because Cuba has found a better way. That better way, it must be noted, is based upon use of instrumentalities that are entitled to respect as autonomous trading companies. This insight into Cuba's inventory of evasion tactics supports Citibank's position.

Conclusion

To comport with principles of applicable law, to respect the fact-finding function of district courts on the issue of identity, and to render a fair and equitable decision on the merits, this Court should reverse the decision of the court of appeals with directions to reinstate the decision of the district court.

Dated: New York, New York
December 2, 1982

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Respondent's Brief

No. 81-984

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-984

FIRST NATIONAL CITY BANK,

Petitioner,

—v.—

BANCO PARA EL COMERCIO EXTERIOR DE CUBA,

Respondent.

BRIEF FOR RESPONDENT

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FIRST NATIONAL CITY BANK,

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BANCO PARA EL COMERCIO EXTERIOR DE CUBA,

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BRIEF FOR RESPONDENT

Question Presented For Review

May the separate juridical status of a foreign government corporation engaged in commerce be disregarded and its property made available to satisfy unrelated claims against the State when the corporation has its own juridical personality and property under foreign law, is similiar in form and function to government corporations commonly found throughout the world, is suing to recover the proceeds of its sale in a routine commercial transaction of its own goods and would retain the proceeds recovered?

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STATEMENT OF THE CASE

1. Both petitioners and the United States' treatment of the record and of the opinions below is seriously inaccurate in several respects and, in part, is pure invention. Respondent will treat in detail these errors under the appropriate sections of the Argument and will present here a more general statement of the case.

This action arose out of the sale of sugar by Banco Para el Comercio Exterior de Cuba (Bancec), a Cuban entity with its own juridical personality and capital engaged in commerce. On August 12, 1960, Bancec entered into a typical export contract to sell a quantity of sugar f.a.s. a Cuban port. The purchaser was to make payment through an irrevocable letter of credit it would establish in favor of seller at a New York bank of its choice (Joint Appendix 65-69) (hereafter J.A.). The contract was executed on behalf of Bancec by its general manager.

The export contract specified the sugar was to come from the refinery Central Rio Cauto.[1] To cover the export, Bancec entered into a written contract on the same day with the National Institute of Agrarian Reform (INRA), the administrator of that Central, to purchase the corresponding amount of sugar. This contract too was typical in its form and terms and was executed on behalf of Bancec by its general administrator. It provided that INRA "sold to buyer a quantity of sugar" and specified a price which would leave Bancec with a margin of profit above the export price. (J.A. 62-64).

The sugar was shipped in due course and payment in the sum of $193,280 was demanded by Bancec through its collecting bank. Petitioner purported to pay the letter of credit but retained the proceeds as compensation for the contemporaneous nationalization of its Cuban branches by the Republic of Cuba (J.A. 307-16).

In February, 1961, Bancec commenced an action to recover the proceeds of the letter of credit, invoking the diversity jurisdiction of the United States District Court for the

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1 In preparing the Joint Appendix petitioner misread its copy of the contract, introduced as Ex. F to Court's Ex. 1, and typed "Central de Coute."

Southern District of New York. Not disputing Bancec's claim, petitioner instead asserted a counterclaim based upon the nationalization of its Cuban branches.

After the initial pleadings were filed, the action remained dormant for many years as the courts proceeded to determine a handful of "test" cases selected from the forty or so Cuban cases filed in the Southern District at the same time as Bancec's action. When counsels' attention was again drawn to the case in 1975, they filed a motion to substitute Empresa Cubana Exportadora de Azucar y Sus Derivados (Cubazucar) for plaintiff on the ground that Bancec had been dissolved and Cubazucar had succeeded under Cuban law to the assets and liabilities of Bancec arising from sugar export operations (J.A. 130-44). Petitioner opposed and the court, Hon. Frederick Van P. Bryan, denied "in the exercise of discretion" the motion on the ground that "to permit such a substitution . . . would only multiply complications in this already complicated litigation" (J.A. 159-61).

A bench trial was held in 1977 before Judge Bryan. Evidence was introduced on the character and status of Bancec under Cuban law and on the value of Citibank's branches. Citibank already had recovered $6,000,000 as compensation, including the $2,100,000 setoff it had successfully asserted in *Banco Nacional de Cuba v. First National City Bank*, 478 F.2d 191 (2d Cir. 1973). Respondent contended that this represented more than 100% of the branches' value.

Judge Bryan died before rendering a decision. Upon consent of the parties that decision and judgment be "rendered upon the written record of the trial" (J.A. 432), Judge Brieant issued his decision on January 7, 1980 (J.A. 290-431). He found that the counterclaim could be asserted in this action and that neither the act of state nor political question doctrines barred its adjudication. Without making specific findings as to the value of petitioner's branches, the court found that application of the valuation standards articulated in a companion case involving Chase Manhattan Bank would result in an amount sufficiently in excess of the $6,000,000 for respondent to take nothing (J.A. 428-29).

In a unanimous opinion (Petition for Certiorari at 1a-13a), the court of appeals reversed, ruling as a matter of law that respondent and its property were not available to satisfy claims against the Republic of Cuba. The court of appeals did not reach the act of state or political question contentions, although it rejected the same contentions in *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875 (2d Cir. 1981), or respondent's contention that the district court had applied erroneous legal standards to the valuation of Citibank's property. Citibank's petition for rehearing with a suggestion for rehearing *en banc* was denied without any judge voting to rehear the case.

If the judgment of the court of appeals is affirmed, the proceeds of the letter of credit, like all assets in the United States of the government of Cuba and Cuban nationals, will be frozen by operation of law to "await such disbursement as may be permitted by appropriate federal authorities." (Pet. 13a; 31 C.F.R. Part 515). If the judgment is reversed, further proceedings will be required on the issue of valuation, as the court of appeals, in *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 893-94 (2d Cir. 1981), disagreed in important respects with the standards of valuation applied by the district court.

2. The basis of the district court's ruling on the issue before the Court is far from clear. It discussed the "devolution" under Cuban law of the claim to the letter of credit proceeds, but did so on its own reading of Cuban statutes not in evidence, never the subject of expert testimony, and without any notice to respondent that the "devolution" of the claim was an issue in the case at all. The government and petitioner's suggestion that respondent concedes the claim passed to the Ministry of Foreign Commerce (*i.e.* the State) would avoid serious problems of law and procedure but it is not true.

While discussing the "devolution" of the claim, the district court appears to have held the counterclaim assertible here exclusively on the theory that Bancec was the *alter ego* of the government. Although mentioning the "devolution" of the claim in a footnote by way of providing context (Pet. 4a, n. 4), the court of appeals did not consider it to be material to the

result reached by the district court or an appropriate subject for consideration in resolving this case.

On the question of *alter ego*, the court of appeals found that the district court had misconceived the legal issue altogether. In its view, the applicable legal principles demand respect of foreign law establishing entities with separate juridical status, property and liability. It follows that a court cannot disregard the separate status of such entities, as the district court did, by reference the government's purposes in establishing them or the corporation's statutory relationship to the government. Any other approach would "cause the courts [of the United States] willy-nilly to pierce the corporate veil of foreign entities such as trading corporations" (Pet. 12a), particularly as they generally may be seen as "agencies or instrumentalities" of foreign governments—the language Congress used in the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq.*, to describe such entities. The result would be contrary to the will of Congress and have untoward and incalculable consequences for the international trade of the United States.

However, the court of appeals believed that a state instrumentality might be identified with the government in some circumstances by virtue of the particular nature of its activity at issue in litigation. The court made clear in its opinion here (Pet. 9a-13a) and in the opinion of the same panel issued on the same day in a companion case, *Banco Nacional de Cuba v. Chemical Bank New York Trust Co.*, 658 F.2d 903, 910-11 (2d Cir. 1981), that it might disregard the "statutory distinction between the state and its instrumentality" if the instrumentality's claim arose from activities which properly may be considered governmental as distinct from commercial, or if the enterprise was not suing "in its own right," or if the enterprise in the particular transaction at hand was not "operating as a separate juridical entity."[2] Contrary to the United States and petitioner's suggestion, the court of appeals manifestly did *not* base its decision here on any notion that an instrumentality may be held liable for the acts of the government only when it participated in the subject matter of the counterclaim.

2 *In Banco Nacional de Cuba v. Chemical Bank New York Trust Co.*, Cuban law vested ownership of the accounts in the State and merely gave

Applying these legal principles to the undisputed record facts, the court of appeals concluded that the counterclaim here must be dismissed as a matter of law even though it expressly "agreed with the district court's description of Bancec's functions and its status as a wholly owned instrumentality of the Cuban government" (Pet. 8a).

SUMMARY OF ARGUMENT

Petitioner and the United States ask this Court to exercise its federal common law powers and create an unprecedented rule of law disregarding the separate juridical status of a foreign government corporation in order to satisfy unrelated claims against the foreign State. The request of the petitioner and the United States must be rejected for several fundamental reasons.

1. There is a strong legal presumption, conceded by petitioner and the United States and grounded in fundamental considerations of sovereignty and international commerce, against disregarding the separate status under foreign law of government corporations and against holding them and their property liable for the unrelated acts of the State. Nothing has been shown to overcome that presumption here. Respondent was similar in form and function to government corporations commonly found throughout the world and it sued upon a traditional commercial transaction. Disregard of its separate corporate status necessarily would place in doubt the status and viability of the state corporate institutions through which a great deal of the world's trade is conducted and upon which many nations rely to achieve their national aspirations.

2. In the Foreign Sovereign Immunities Act, Congress made broad exceptions to the immunity of foreign government corporations, sufficient to protect those dealing with them in commercial relations, but those exceptions apply only to the

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Banco Nacional the task of "possession, administration or liquidation." 658 F.2d at 911. For that reason, the court of appeals allowed a counterclaim based on the acts of the government to defeat Banco Nacional's claim.

corporations' *own* acts. As the claim here is based on the acts of the Cuban government, respondent is immune from the counterclaim under the FSIA. Congress found that there was a "compelling" reason to avoid subjecting foreign government corporations and their property to suit, counterclaim or execution for the acts of the State: it was necessary to avoid giving foreign countries any precedent or encouragement for disregarding the separate status of United States corporations and their subsidiaries.

3. International law requires acceptance of the government corporation as an institution not responsible for the debts or acts of the State. This rule of law is part of a broad accomodation between the claims of trading nations for immunity for their corporate instrumentalities and the demand of those dealing with them that such enterprises and their property be subject to claims in much the same way as private corporations. The rule of law is also based on the community of nations' recognition that international trade requires respect for the status of a corporation, public or private, according to the law of its creation.

4. If statutory and international law do not provide a rule for decision, the Court must consider whether it may properly exercise its power to make federal common law and to what effect. Any rules of federal comon law must conform to the policies expressed by Congress against disregarding the separate status of foreign government corporations and opposing depletion of the fund of frozen Cuban assets. If there are to be any exceptions to those policies, they are for Congress alone to decide, as they require initial policy determinations clearly inappropriate for judicial discretion. Further, the necessary consideration of complex international political and economic issues is not within the competence of a court.

5. Petitioner and the United States efforts to draw upon domestic law principles in fashioning a rule of federal common law here is inappropriate. Foreign government corporations are *sui generis* and present a distinct set of legal and policy considerations. In any event, domestic law principles support respondent to the extent at all relevant.

6. Arguments based upon the dissolution of respondent and the transfer of the claim sued upon here are not properly part of this case. The issue was not raised in the district court by petitioner and respondent had no opportunity to present expert opinion or evidence on this question of Cuban law. In any event, respondent is correct in its construction of Cuban law.

7. There is no "clearly erroneous" issue. The court of appeals reversed the lower court because it had misconceived the legal issues.

ARGUMENT

I

AT A MINIMUM, THERE IS A STRONG LEGAL PRESUMPTION FAVORING RESPECT OF THE SEPARATE STATUS OF FOREIGN GOVERNMENT CORPORATIONS NOT REBUTTED HERE AND HENCE DISPOSITIVE.

Petitioner and the United States concede that there is at least a strong legal presumption, grounded in fundamental considerations of sovereignty and international commerce, favoring respect of the separate status and liability of foreign government corporations. They seek, therefore, something exceptional about Bancec or the claim it prosecutes to justify assertion of the counterclaim against respondent. No such exceptions can be found.

A. Bancec Was Similar In Form And Function To Commonly Found Government Corporations

Petitioner and the United States' assertion that Bancec is so different as to permit exceptional treatment are merely *ex cathedra* pronouncements and are manifestly fallacious. The record concerning Bancec and a survey of the institutions of other countries dispose of their argument.

1. *Bancec's organization and operation*

Bancec was established by Law No. 793 of April 25, 1960 (J.A. 36-56) "with full juridical capacity and capital of its own

. . . ." (J.A. 37). It could sue and be sued (J.A. 188) and was not responsible for the State's debts and actions, just as the State was not responsible for its debts and actions (J.A. 190).

Bancec's capital was subscribed and paid for by the Republic of Cuba through the transfer of the capital of *Banco Cubano del Comercio Exterior*, a government corporation established in 1954 by the prior government, and a portion of the capital of the government's wholly-owned *Banco de Desarrollo Economico y Social* (the Bank for Social and Economic Development), similarly established well before the change of government in 1959 (J.A. 53-4, Pet. 3a). Bancec was declared the successor to the assets and liabilities of *Banco Cubano del Comercio Exterior* (J.A. 57). This initial provision of working capital was the only way in which the State financed Bancec, as there were no provisions for the corporation receiving periodic appropriations from the State. Bancec was authorized, however, to raise additional funds for its operations by issuing bonds and other securities, which could be secured by its assets (J.A. 43-44).

Bancec was to act in part as a development and commercial bank and in part as a trader itself engaged in international commerce. It was to provide financing and credit to Cuban exporting and importing enterprises, make investments for the development of the nation's foreign trade, and engage in other banking functions in connection with trade (J.A. 41-45). It was authorized "to buy in the country and sell abroad all kinds of national agricultural, industrial or mining products . . ." and to "purchase all kinds of products in foreign markets and sell them in the country directly or through its own agents or concerns . . . ." (J.A. 41-42). In order to promote the stability of sugar prices all producers of sugar, whether private or public, had to export through Bancec in the period in question (J.A. 201).

Bancec was to carry out these and other operations with the stated purpose of contributing to and collaborating with the government's international trade policy (J.A. 39). Aside from this general statement, Law No. 793 provided a list of trade and development objectives which were also stated in broad terms and are familiar to all economies: to contribute to the equilibrium of the balance of payments; to increase the na-

tion's exports without constricting supply of essential commodities for domestic consumption and use; to maximize the export of manufactured goods (and hence the development of the manufacturing sector); to develop diversified foreign markets for Cuban trade; and so forth (J.A. 39-40).

Whatever its more ambitious development objectives might have been, the transaction at issue here could not have been more routine or traditional. Bancec exercised its statutory authority to buy sugar, Cuba's principal commodity for export, and sell it abroad to Cuba's traditional markets. Like all of its trading activities, the transaction was conducted by Bancec "only on the basis of trade or commercial considerations, such as quantity, prices, specifications of the product, marketing. . . ." (J.A. 192). The transaction was typical of the activities Bancec in fact carried on (J.A. 190).

The purchase price of the export, like any other income, was Bancec's own property and would have been retained by it. The State, which had capitalized and was the owner of Bancec, was entitled only to the net profits semi-annually, less the amount reserved by Bancec for its "proper operation" (Pet. 4a; J.A. 39). Petitioner is thus inaccurate in suggesting that Bancec's "income" went to the State (Petitioner's Brief at 2) (hereafter Pet. Br.).

Petitioner is also more than a little misleading in asserting that "there is no indication that [Bancec] had any creditors apart from the Cuban government or instrumentalities of that government." *Id.* Aside from the fact that it was the petitioner's burden to prove any such fact, the record shows that Bancec was authorized to and did import on its own account (J.A. 42, 206), and was authorized to issue letters of credit and presumably did so in connection with its financing of imports for private as well as public importers (J.A. 45, 190).

Bancec bought sugar and other commodities for export from private as well as public enterprises (J.A. 191, 201). There is nothing to suggest that its purchase of the sugar exported here was any different than its purchase of sugar from a private party. Contrary to petitioner's unsubstantiated and misleading characterization, Bancec did not "acquire" the sugar from INRA (Pet. Br. at 2); it *bought* the sugar pursuant to a standard form commercial contract and was obligated on that

contract to pay the specified purchase price. Further, the price Bancec was required to pay INRA would leave it with a margin of profit on the export sale, and there were other traditional commercial terms. (J.A. 62-64).

Petitioner and the government repeatedly state, in quotation marks, that Bancec was to manage "the export of commodities for the account of the Government," *e.g.*, Pet. Br. at 2. This is a quotation from the opinion of the district court, not from any evidence in the record. The relevant statutes, contracts and testimony are clear that Bancec purchased and resold the sugar for its own account. Bancec acquired title through purchase and conveyed its title by a sale, the proceeds of which it would own and retain. It alone was liable on both sets of contracts and neither it nor the other parties to those contracts had recourse against the government. Consistent with its focus upon supposed ultimate purposes, the district court obviously was suggesting that Bancec exported "for the account" of the government only in the sense that ultimately the Treasury would benefit from export operations, not in any legal sense of agency or the like.

Bancec's governing board was to decide on the corporation's credit and trade "policy" and approve the corporation's budget. It was composed of the President of the National Bank sitting *ex officio* and representatives of several ministries and of INRA (J.A. 46-48). In contrast, the corporation's General Manager, appointed by the board, "shall directly manage all matters, business and offices" and "decide upon all operations and business." (J.A. 50). There is nothing in the record suggesting the involvement, direction, or even supervision of the transaction at hand or similar transactions by the government or, indeed, by the board. To the contrary, this was a routine export of sugar by administrative personnel; Bancec was "operating as a separate juridical entity" in this and similar transactions (Pet. 13a).

Bancec was the carbon copy in form and function of its predecessor state corporation, *Banco Cubano del Comercio Exterior,* created by the prior government in 1954 (J.A. 3-32).[3]

3 Although Law No. 1425 contemplated minority private participation in *Banco Cubano*, the private sector never purchased securities and the State

Indeed, the continuity was such that petitioner's only witness on the *alter ego* question, the former Vice President in charge of its Cuban branches, thought that there was only one institution, Bancec, which was founded in 1954 (J.A. 184-86) and further testified that the "same activities were conducted before 1959 and subsequent to 1959." (J.A. 185).

2. *The government corporations of other countries*

Respondent has prepared a survey of government corporations as found in the developing countries (Latin America, Africa and Asia), the socialist countries, and the advanced industrial countries. Set out separately as an Appendix to the Brief, the survey leaves no doubt that Bancec is indistinguishable in any meaningful fashion from countless other government corporations found throughout the world, no doubt numbering in the thousands.

Among the points which emerge from the survey are the following:

1. Government corporations, including state trading corporations, are almost invariably conceived of as instrumentalities of the state for the advancement and fulfillment of its economic and political objectives and are required to collaborate and act in accordance with the economic, political and development policies of the state.

2. The developing world (as did some Western European countries at various times) sees the corporations as major and preferred instruments of social and economic change, essential to the emergence of a new international political and economic order which began with the end of the colonial era.

3. The state commonly creates a government corporation to provide credit or to undertake large industrial or commercial projects in accordance with the government's development

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was the sole owner (J.A. 36-37). In addition to its operations as a development and commercial bank in the area of foreign trade, *Banco Cubano* was also authorized to engage in export trade both on its own account and as agent (J.A. 27) and exercised that power. *See, Empresa Cubano Exportadora de Azucar y Sus Derivados v. Lamborn and Co.*, 652 F.2d 231, 233 (2d Cir. 1980).

plans; to generate income, particularly foreign exchange, ultimately available for the state's use in furthering its policies; and to promote exports and also import substitution. Trading corporations have the particular objectives of serving as positive instruments of developmental and trade strategies; of raising revenues for the treasury; of stabilizing and securing better export and import prices; of encouraging production of important agricultural and industrial commodities; and of securing the advantages of bulk transactions.

4. Government corporations invariably are created with their own legal personality. They are not responsible for the acts and debts of the state, nor the state for their debts and acts. Respect of their separate legal status, property and liability is considered absolutely essential to their viability.

5. The state typically contributes all of the capital and the corporations typically are wholly dependent upon state funding in that or other forms. Unlike Bancec, many institutions receive periodic appropriations from the state's treasury in lieu of capitalization.

6. Almost invariably, net profits minus reserves for future operations periodically pass to the treasury. More frequently than not, the state, not the corporation, determines the amount of reserves to be withheld.

7. Invariably, the corporation's governing board is controlled by the government. Frequently, the board is composed exclusively or overwhelmingly of some combination of high-level officials sitting *ex officio* and the representatives of government departments. It is quite common for one or more ministers to be on the board (in which event a minister serves as chair). It is also common for other government corporations to have representatives. To the extent not composed of government officials sitting *ex officio* and representatives of concerned ministries, the board is in any event appointed by the government.

8. There is frequently direct government control of the corporation's budget, pricing policies, investment decisions

and all major policy decisions with macro-economic, social or political implications. In many instances, the extent of government control through various statutory mechanisms is such that any matter, whether of policy or management, can be dictated by the government and often is. The extent of government dictation of policy and management decisions is often far greater in practice than suggested by statutory norms.

9. It is quite common in developing countries for a government corporation to exercise a monopoly over a particular economic activity, including a monopoly of export products particularly important to the national economy or over exports generally. In socialist countries, the trading corporations have a complete monopoly over trade. Instances of monopoly are also numerous in advanced industrial countries.

10. Frequently, the corporation has the exclusive concession to exploit natural resources owned by the state. Often, the corporation exports products which it itself grows or manufacturers, or which are grown or manufactured by other state corporations or the state.

11. Frequently, the corporation sells on its own account (and sometimes as agent) commodities placed in the public sector through nationalization of the property (*e.g.* oil) or of the means of production (*e.g.* sugar acreage and refineries).

12. A developing country usually has several government corporations and sometimes scores of them operating in related economic spheres, and the government consistently seeks to harmonize and coordinate their activities through a variety of mechanisms.

13. Governments routinely exercise their power to dissolve state corporations and transfer their assets, liabilities and functions to one or several existing or newly-created state corporations, which are declared their legal successors.

Measured by reference to these points or any others which emerge from a survey of the institutions, Bancec was well within the generality of government corporations in its form, relations to the government, functions and purposes. Indeed, in several respects it was more autonomous, performed more

traditionally commercial activities and pursued more traditionally commercial goals.

B. Petitioner's Fraudulent Scheme Theory Is Without Any Basis In The Record And Is Barred As A Matter Of Law.

There is no finding by the court that the Cuban government created and used Bancec for the purpose of advancing a fraudulent scheme to nationalize property in violation of international law and to escape responsibility by marketing the nationalized property through state trading corporations. Nor is there any evidence in the record to support petitioner's theory. Petitioner concedes as much by setting forth its rendition of Cuban history without citation to the record and by seeking to rely upon evidence not in the record, a speech by one of the several leaders of the Cuban Revolution made three years after the events in question. (Pet. Br. at 21-23). This effort to introduce evidence on appeal, in this Court, simply serves to emphasize that the record is devoid of support for petitioner's contention.[4]

Indeed, petitioner's contention is at war with the record, whether one looks to the origins of the sugar exported by Bancec or the creation of Bancec itself.

The sugar Bancec purchased from INRA was refined at Central Rio Cauto, which had been intervened by INRA eight months previously on January 15, 1960 (J.A. 33, 210). The intervention resolution (J.A. 33-35) recites that the owner of the Central had stated it was unable to continue operating the refinery due to failing economic conditions and had offered the Central for sale to INRA. The resolution further recites that in order to prevent economic dislocation, it was advisable that INRA, "in accord with the petition" of the owner, intervene in the Central pending study of the offer of sale and acquisition of the property. *Id.* There is *nothing* in the record upon which the recitals of the resolution can be doubted and there are no contrary findings by the district court. Indeed, the record shows that a substantial number of refineries continued

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4 The speech, it may be noted, does not appear to support respondent's rendition of Cuban history.

in private hands throughout this period (J.A. 191, 201).

There has never been an adjudication here or elsewhere that this intervention was a violation of international law and there is no basis on which such a contention could be made. The stated reasons for the intervention are unexceptional; there is no proof that the Central was owned by United States or other foreign nationals; there is nothing on the face of the resolution or elsewhere to suggest it was issued for the purpose of retaliating against the United States government or that its issuance had a discriminatory effect on United States nationals; and there is no way of knowing whether the financial condition of the enterprise merited compensation even if compensation was due under some body of law. Compare the findings of illegality in *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845 (1962), *rev'd. on other grounds*, 376 U.S. 398 (1964) *First National City Bank v. Banco Nacional de Cuba*, 478 F.2d 191 (2d Cir. 1973).

The sequence of events shown in the record is also at odds with Citibank's contention of illegality. The intervention of the Central was decreed seven months before issuance of Law No. 851, which authorized the first large-scale nationalization of United States-owned property. In between, as the district court found (J.A. 296-97), were the decisive precipitating events.[5]

Besides evidence not in the record, petitioner offers only a citation to *Banco Nacional de Cuba v. Sabbatino*, to support its factual argument. The citation is as misleading as the attempt to introduce evidence on appeal is improper. The sugar in *Sabbatino* was nationalized on August 6, 1960, pursuant to Law No. 851, which has been held *on its face* to be retaliatory and discriminatory in violation of international law. While *shipped* during August, the sugar at issue here came from a mill intervened eight months earlier, in January, pursuant to an entirely different decree, unexceptional on its face and never the subject of adjudication by the courts of the United States.

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5 The courts of the United States have held Law No. 851 and the Resolutions under it to be in violation of international law precisely *because* they were issued for the purpose of retaliating against the United States government's elimination of the sugar quota in July. *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d at 867-68; *Banco Nacional de Cuba v. First National City Bank*, 478 F.2d at 193.

Nor does the record concerning Bancec's creation fit Citibank's conspiracy theory. The reasons stated on the face of the statute for its creation have nothing to do with nationalizations or relations with the United States (J.A. 30). Further, Bancec was the uninterrupted successor of a pre-Revolutionary state institution almost identical in form and function (J.A. 3-32; 36-37). Both before and after the Revolution, Cuba widely used the corporate form for domestic public institutions as well as in the international sphere (J.A. 198-200). Bancec was established in April 1960, before the nationalization of United States property and before the acts of the United States reducing the sugar quota to which those nationalizations were a response. The only witness familiar with Bancec or expert on Cuban law denied that it was established to insulate the government from the claims of foreign nationals (J.A. 198) and there is no testimony to the contrary.[6]

The fraudulent scheme theory is barred as a matter of law as well. Whatever controversy may exist over the appropriate scope of the act of state doctrine, there is an independent, unchallenged aspect of that doctrine and of the more general requirement of justiciability which precludes the courts of the United States from inquiring into the motivations of a foreign sovereign. As the court stated in *Hunt v. Mobil Oil Corporation,* 550 F.2d 68, 77 (2d Cir. 1977):

> The American judiciary is being asked to make inquiry into the subtle and delicate issue of the policy of a foreign sovereign, a Serbonian Bog, precluded by the act of state doctrine as well as the realities of the fact finding competence of the court in an issue of far-reaching national concern.

Other courts have concurred and have uniformly refused to inquire into the motivations of a foreign sovereign in taking

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6 Petitioner invokes the brief submitted by the United States urging the Court to grant the petition. Of course, the factual assertions of the United States are not proof of anything. Further, the United States has abandoned its original position, cited by petitioner from the United States brief in support of the petition, that the intervention of the sugar refinery was part of the same nationalization "program" that took Citibank's branches.

governmental measures and most emphatically when the allegation is that the foreign sovereign acted fraudulently or for hidden reasons.[7] The House of Lords has agreed, *Buttes Gas & Oil Co. v. Hammer,* [1981] 3 W.L.R. 787, because of the "nature and limits of the judicial function."

The courts steadfastly have refused to inquire into the sovereign's motivations in undertaking a single, discrete government act. Citibank seeks an inquiry into the motivation of the leaders of the Cuban government from before they overthrew the prior government on January 1, 1959, through the tumult of the next two years. Such an endeavor simply cannot be reconciled with the principles of justiciability and the limitations on the competence and functions of courts recognized in *Luther v. Borden,* 49 U.S. (7 How.) 1 (1849), *Baker v. Carr,* 369 U.S. 186 (1964), or *Banco Nacionai de Cuba v. Sabbatino,* 376 U.S. 398 (1964).[8] Such an inquiry is the function of historians at best, and even they have been unable—af-

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7 *See, e.g., Compania de Gas de Nuevo Laredo, S.A. v. Entex,* 686 F.2d 322 (5th Cir. 1982); *Occidental of Umm al Qaywayn v. A Certain Cargo,* 577 F.2d 1196 (5th Cir. 1978), *cert. denied,* 442 U.S. 928 (1979); *General Aircraft Corp. v. Air America, Inc.,* 482 F. Supp. 3 (D.D.C. 1979); *Bokkelen v. Grumman Aerospace Corp.,* 432 F. Supp. 329 (E.D.N.Y. 1977); *Occidental Petroleum Corp. v. Buttes,* 331 F. Supp. 92 (C.D. Cal. 1971).

In *Banco Nacional de Cuba v. Sabbatino,* 307 F.2d 845 (2d Cir. 1962) and *Banco Nacional de Cuba v. First National City Bank,* 478 F.2d at 192, the lower courts based their finding that Law No. 851 of July 12, 1960 and the Resolutions thereunder were, *on their face,* issued for retaliatory purposes.

8 Given its unique nature, the inquiry Citibank proposes is nonjusticiable under any circumstances and places it beyond any proposed "counterclaim" or "*Bernstein* letter" exceptions to the act of state doctrine. *Cf., First National City Bank v. Banco Nacional de Cuba,* 409 U.S. 897 (1972). We note, however, that there are no such exceptions. In *First National City Bank v. Banco Nacional de Cuba,* a majority rejected any counterclaim exception, and the *Bernstein* exception failed to gain adherence by a majority. There was no reliance on *Bernstein* in any of the opinions in *Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682 (1976), and the procedural posture of the claim there was not emphasized. Further, there is no *Bernstein* letter here on the point raised by petitioner. The State Department submitted a letter in this case well before petitioner's conspiracy theory emerged and simply adhered to the position taken in *First National City Bank v. Banco Nacional de Cuba,* that it had no objection to the courts adjudicating the legality of the nationalization of Citibank's branches under international law.

ter twenty years of research and thought, and thousands of written pages—to come to a consensus about events in Cuba in this two-year period.[9]

Moreover, petitioner's theory improperly focuses upon the *purposes* of the instrumentality rather than upon the *nature* of its acts. Most instrumentalities in most situations act for governmental purposes and implement through their commercial acts the economic and political policies established by the government. If the purpose of the act, and not its commercial nature, controls, then nothing would be left of the separate status of state instrumentalities generally or of the strong presumption petitioner and the United States concede.[10]

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9 *See, e.g.* Bonachea & Valdes, eds., *Program Manifesto of the 26th of July Movement,* in *Cuba in Revolution* 113-140 (1972); Dominguez, *Cuba: Order and Revolution* (1978); Draper, *Castro's Revolution: Myths and Realities* (1962); Huberman & Sweezy, *Cuba: Anatomy of a Revolution* (1968); Karol, *Guerrillas in Power* 179 (1970); Lleó, *Fidel Castro and Company, Inc.: Communist Tyranny in Cuba* (1964); MacGaffey & Barnett, *Cuba: Its People, Its Society, Its Culture* (1962); Matthews, *Fidel Castro* (1969); Morray, *The Second Revolution in Cuba* (1962); Nelson, *Cuba, The Measure of a Revolution* (1972); O'Conner, *The Origins of Socialism in Cuba* 279-80 (1970); Smith, *The Fourth Floor: An Account of the Castro-Communist Revolution* (1962); Smith, *What Happened in Cuba? A Documentary History* 259-63 (1963); Suárez, *Cuba: Castroism and Communism, 1959-66* (1967); Thomas, *Cuba: The Pursuit of Freedom* (1971); U.S. Dep't of State, *The Castro Regime in Cuba* (Aug. 1961); World Bank *Report on Cuba* (1952); Zeitlin & Scheer, *Cuba: Tragedy in Our Hemisphere* (1963).

10 There would be no reason to limit petitioner's purpose test to the implementation of nationalization policies as distinct from other governmental policies. We note, however, that nationalizations are frequent, widespread and continuing. Petitioner's test would necessarily sweep within its ambit the scores of state trading corporations marketing the nationalized property and thereby much of international trade.

A few statistics suggest the dimensions. According to State Department reports, between 1960 and 1971, 34 developing countries considered "non-communist" by the State Department nationalized or took other expropriation actions against United States property in a manner giving rise to international dispute; in many instances, the nationalizations were quite widespread. *Nationalization, Expropriation, and Other Takings of United States and Certain Owned Foreign Property Since 1960* (1971). Between 1977 and 1980, 52 nations were involved in active nationalization disputes. State Department, Bureau of Intelligence Research, *Research Study: Disputes*

In the closely related context of sovereign immunity, Congress recognized that any test focused upon the *purpose* of an activity would sweep too broadly. It therefore specified in the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.* (1976), that the "commercial activity" upon which states and their instrumentalities may be sued is to be

> ". . . determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.*, § 1603(d).

This concept is "of central importance."[11] The restrictive theory of immunity as found in customary international law also looks to the nature of the act and not its purpose. *Claim Against Empire of Iran,* 45 I.L.R. 57, 80 (Fed.Rep. of Germany, Fed.Const.Ct., 1963).

Petitioner's purpose test is at odds with the premises of the FSIA and the restrictive theory of immunity in another important respect. Focusing upon the nature of the act rather than its purpose avoids undue affront, since "sovereignty, as such, is not implicated . . .": "the foreign state makes its appearance in the market place as a merchant, not as a sovereign, and it is as a merchant that the foreign state is adjudged liable on its commercial obligations." *FSIA Hearings, supra,* at 30. This consideration is equally important to the restrictive theory of immunity as the need to protect private persons. *Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. at 703. Petitioner proposes that the courts go behind the sovereign's "appearance in the market place as a merchant" to investigate

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Involving United States Foreign Investment, Rep. No. 1441 (Aug. 18, 1980). Drawn only from reports of United States-owned property, these figures necessarily understate the scope of petitioner's purpose rule simply for nationalizations; an instrumentality would be identified with the state if it was marketing nationalized Dutch oil from Indonesia as much as nationalized United States oil from Libya.

11 Hearings, *Jurisdiction of U.S. Courts In Suits Against Foreign States, the Subcomm. on Ad.Law and Govt'l Relations, Comm. on Jud.,* 94th Cong., 2d Sess. 27 (June 2 and 4, 1976) (State Dept. Legal Adviser Monroe Leigh) (hereafter *FSIA Hearings*).

the sovereign's purpose in entering the market place and adjudicate the liability of its instrumentalities accordingly.

Finally, petitioner's purpose test would re-introduce act of state complications into international trade in an important respect. In *Dunhill,* the Court found it did not have to determine whether the failure to pay the commercial debt was within the act of state doctrine because there was no proof that there was any act of state involved at all. The operator of the intervened cigar factory was not considered part of the "Cuban government itself." For that reason, the operator needed to prove a "statute, decree, order or resolution of the Cuban government itself" directing it to dishonor the commercial debt in order to invoke the act of state doctrine as a defense. 425 U.S. at 695. Yet if the purpose pursued by the operator in marketing the intervened goods could have resulted in its being considered the *alter ego* of the government in that endeavor, then presumably nothing more than the operator's *own* acts would be necessary to show an act of state.

II

THE FOREIGN SOVEREIGN IMMUNITIES ACT AND INTERNATIONAL LAW REQUIRE RESPECT OF RESPONDENT'S SEPARATE STATUS

A. Under The FSIA, Respondent Is Immune From A Counterclaim Based On The Acts Of The Government.

Under the FSIA, a state instrumentality and its property are immune from suit, execution or counterclaim except where the Act otherwise specifically provides. 28 U.S.C. §§ 1603, 1604, 1609. The statute provides broad exceptions to the immunity of an instrumentality, securing for those having commercial relations with it substantially all the rights they have when dealing with a private corporation.[12] However, the exceptions

12 For example, the property of the instrumentality is subject to execution without limitation, § 1610(b), and the instrumentality is subject to punitive damages, § 1606. In contrast, the only property of the State subject to execution is the particular property used in the commercial activity giving rise to the claim, § 1610(a), and the State is not subject to punitive damages, § 1606.

to the instrumentality's immunity are only for its own acts. Here, the claim is not based upon respondent's acts and the immunity provisions apply. Further, the FSIA makes foreign law controlling as to whether an entity is to be considered a separate instrumentality or part of the state.[13]

The FSIA uses the term "agency or instrumentality of a foreign state" to mean any entity "which is a separate legal person, corporate or otherwise" and is "an organ of a foreign state . . . or a majority of whose shares or other ownership interest is owned by a foreign state". § 1603(b). The House Report makes clear that whether an entity is a "separate legal person" for purposes of the FSIA is exclusively a question of foreign law: "The first criterion, that the entity be a separate legal person, is intended to include a corporation or any other entity which, *under the law of the foreign state where it was created,* can sue or be sued in its own name, contract in its own name or hold property in its own name." (emphasis added) H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 15 (1976).

The court of appeals found that the FSIA recognizes the separate status and liability of a "separate legal person" defined in this manner. *See also, Gibbons v. Rep. of Ireland*, 532 F. Supp. 668 (D.D.C. 1982). The commentators concur,[14]

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13 The FSIA applies to actions pending on its effective date, as this action was. 28 U.S.C. § 1602; *Corporacion Venezolana de Fomento v. Vintero Sales*, 629 F.2d 786, 790 (2d Cir. 1980); *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 851 (S.D.N.Y. 1978); *Upton v. Empire of Iran*, 459 F. Supp. 264 (D.D.C. 1978); *Ohntrup v. Firearms Center, Inc.*, 516 F. Supp. 1281, 1284 (E.D. Pa. 1981). The Department of State has taken the same position. *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. at 849 n.1.

14 *See*, von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 Colum. J. Transnat'l. L., 35, 55 (1978); Note, *The Statutory Proposal to Regulate the Jurisdiction Immunities of Foreign States*, 6 Van. J. Transnat'l. L. 549 , 578 (1973); Sklaver, *Sovereign Immunity in the United States: An Analysis of S. 566*, 8 Int'l Law. 408, 422 (1974); Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origins, Meaning and Effect*, 3 Yale Studies in World Public Order 122 (1976); Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court*, 46 Fordham L. Rev. 543,568 (1977).

and the lower courts have recognized the distinction between instrumentalities and the State in several contexts.[15]

The execution provisions illuminate the statute's structure and the Congressional intent. As the court of appeals explained (Pet. 12a-13a), § 1609 provides that the property of an instrumentality is immune from execution except insofar as § 1610 provides to the contrary and § 1610 permits execution on the property of an instrumentality only to satisfy claims arising from its *own* activities.[16] The House Report confirms this construction: "§ 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy judg-

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15 *See, Nat'l American Corp. v. Fed. Rep of Nigeria*, 448 F. Supp. 622, 638 n. 26 (S.D.N.Y. 1978), *aff'd on other grounds*, 597 F.2d 314 (2d Cir. 1979) (instrumentality's presence in United States does not confer jurisdiction over the State); *East Europe Domestic Int'l Sales Corp. v. Terra*, 467 F. Supp. 383, 387-8 (S.D.N.Y. 1979), *aff'd*, 610 F.2d 806 (2d Cir. 1979) and *Texas Trading & Milling Corp.* v. *Fed. Rep of Nigeria*, 647 F.2d 300, 314-5 (2d Cir. 1981) *cert. denied*, ___ U.S.___, 102 S.Ct. 1012 (1982) (agency agreement can be formed by instrumentality and State since they are legally distinct), *Verlinden, N.V. v. Central Bk. of Nigeria*, 488 F. Supp. 1284, 1301 (S.D.N.Y. 1981) (Weinfield, J.), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *cert. granted on other issues*, No. 80-920, ___ U.S. ___, 102 S. Ct. 997 (1982) (obligations of Central Bank not those of State).

Petitioner and the United States cite no case to the contrary. In *Yessenia-Volpin v. Novosti Press Agency*, the issue was whether the defendant qualified as an "agency or instrumentality" under § 1603(b) and, if so, whether the particular act upon which it was sued was within the statutory exceptions to the immunity from suit conferred upon all instrumentalities. The court's determination of the first question has no implications here; otherwise, all government corporations are always to be considered liable for the acts of the government. *Arrango v. Guzman Travel Advisers Corp.*, 621 F.2d 1371 (5th Cir. 1980) is to the same effect. The government citation of *Oslow v. Nuklearna Elektrama Krako*, 441 F. Supp. 827 (D.D.C. 1977), proves too much. The court there held that the defendant was so far removed from the State as not to qualify as an "agency or instrumentality" within the meaning of § 1603(b)(1) or (2). The other FSIA cases cited do not address any remotely relevant issue at all.

16 The United States has agreed in the recent past, 1979 Brief for the United States as *Amicus Curiae* at 25, in *Electronic Data Systems Corp. v. Social Security Organization of the Government of Iran*, 610 F.2d 94 (1979).

ment against another, unrelated agency or instrumentality." H.R. Rep., *supra*, at 29.[17]

The FSIA's provisions on nationalization claims, of particular moment here, similarly make clear that an instrumentality is immune from suit and its property from execution except for its own acts. Under § 1604 the State and any instrumentality are immune from suit except as § 1605 may otherwise provide. Section 1605(a)(3) provides a limited exception to the immunity of both the State and the instrumentality from nationalization claims: there is no immunity in a case "in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial

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17 Section 1610(a) permits the execution of a judgment against property of a "foreign state" only if "the property is or was used for the commercial activity upon which the claim is based." The statute defines "commerical activity" to mean "either a regular course of commercial conduct or a particular commercial transaction or act." § 1603(d). The House Report elaborates upon the definition by stating that a "regular course of commercial conduct" includes the "carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation." H.R. Rep., *supra*, at 16.

The result is that the property of the state trading corporation is subject to execution only for that corporation's own acts. The property of the trading corporation would not have been used by the mining extraction company and, hence, would not be subject to claims arising from the mining company's operations; execution is prohibited because the property executed upon would not have been "used for the commerical activity upon which the claim is based", as is required by § 1610(a). This is true even if the state trading company and the mining company were both considered *alter egos* of the state or if the state itself conducted the mining operations.

Section 1610(b) continues the distinction between the state itself and the instrumentality. The subsection exposes the property of the instrumentality to execution only if "the judgment relates to a claim for which *the agency or instrumentality* is not immune" from suit (emphasis added). The subsection does *not* provide that the property of the instrumentality is subject to execution on a judgment which relates to a claim for which the state itself is not immune.

Additionally, "*any* property in the United States of . . . an instrumentality" is subject to execution if the instrumentality is engaged in a commercial activity in the United States (emphasis added). In contrast, § 1610(a), the only section applicable to the state, permits execution upon property only if it is used for a "commerical activity".

activity carried on in the United States . . ." Under § 1610(a)(3), such a judgment may be satisfied only by execution upon the nationalized property (or property exchanged for it). Of course, an instrumentality would be concerned with such a suit or execution proceeding only if it owned or possessed the nationalized property. An additional exception applies to the instrumentality *but only if it owns or operates the nationalized property.* In that event, a claim arising from the nationalization of that property may be prosecuted against the instrumentality even if the nationalized property is not in the United States. Further, § 1610(b)(2) permits execution upon *any* property of the instrumentality to satisfy a nationalization judgment against the instrumentality. The result is that the instrumentality and its property are immune from nationalization claims unrelated to its own conduct.

In the course of discussing the execution provisions, Congress explained why it preserved the immunity of state instrumentalities except for their own acts, H.R. Rep. *supra*, at 29:

> There are compelling reasons for this. If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage the foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or a U.S. corporation and its independent subsidiary.

Contemporary events make clear why Congress was fearful of any precedent disregarding the separate status of foreign government corporations. During the last several decades, the corporations of the United States have come to operate on a world-wide scale through a system of wholly-owned subsidiaries. These multinational enterprises dominate United States international trade and investment.[18] There is a widely-held

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18 See United States Dept. of Commerce, *Survey of Current Business* (Aug. 17, 1980); Brief for the United States in *In re Arbitration Between Maritime International Nominees Establishment and U.S.A. v. Republic of Guinea*, U.S.Ct. of App., D.C. Cir., No. 81-1073, *reprinted in*, 20 Int'l Legal Mat. 1436 (1981); United Nations Centre of Transnational Corporations, *Measures Strengthening the Negotiating Capacity of Government, In Their Relations With Transnational Corporations*, 15-16 (1982); Rubin, *The Multi-National Enterprise At Bay*, 68 Am. J. Int'l. 475 (1974).

perception that the group of corporations compromising a multinational enterprise "are linked by common managerial and financial control so that they pursue integrated policies." *Restatement of Foreign Relations Law* 66 (Revised) (Tent Draft No. 2, 1981). In the view of the United Nation's Centre on Transnational Corporations, a "single company-control system" seeks to achieve the corporations' over-all goals. Further, "significant and increasing proportions of goods and services exchanged in the world economy reflect international administrative decisions made within TNCs [transnational corporations] rather than independent, arms-length market decisions." United Nations Centre on Transnational Corporations, *Measures Strengthening The Negotiating Capacity of Government, In Their Relations With Transnational Corporations* 5 (1982). There has been, in the U.N. Centre's view, a progressive increase in "captive exchanges" within the enterprise, *id.* at 10-11, in which the pricing policies of the affiliates are dictated by the parent to finance the concentrated development of the enterprise as a whole. *Id.* at 12-13.

The character of multinational enterprises as an integrated operation serving a common, coordinated goal although organized in the form of separate corporations has provoked the intense, and more often than not, highly critical attention of the third world and of the United Nations agency established as a result of their concerns.[19] The President of the International Court of Justice has taken note in dictum of the multinational enterprise in precisely the terms Congress found alarming, *Case Concerning Barcelona Traction Light and Power Co., Ltd.*, 1970 I.C.J. 3, 55, 56-57 (sep. op. of President Bustamente y Rivero):

> [T]he already familiar appearance of the limited company was quite simply borrowed, though the holding company introduced into the institution a heterogeneous element, one contrary to its very nature, by denying a truly inde-

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19 *See, e.g.*, United Nations Economic and Social Council Committee on Transnational Corporations, *Transnational Corporations in World Development: A Re-examination*, (1978) and United Nations Centre on Transnational Corporations, *supra*.

> pendent legal personality to the subsidiary companies of the constituent group and placing them entirely under the authority of the parent, or chief company of that group, the holder of all or a majority of their shares. . . . . [W]hat unites the constituent group is generally only an invisible point, a network of hidden links consisting in the decisions of the central organs of control, which 'radiate' to the directors of the subsidiaries who are charged with their implementation. It is a further advantage of this system that the central entity of the holding company does not necessarily have to be registered or to be seen to carry on business in the country where the capital is invested: all that is required is that the subsidiaries may appear there in the guise of independent legal entities. The result is a certain possibility of evading responsibilities. . . . . This *de facto* reality of the conduct of holding companies . . . represents the most usual case. . . .

The *Restatement of Foreign Relations Law* 77 (Revised) (Tent. Draft No. 2, 1981) has since reported that, precisely as Congress feared, "The legal systems of some countries that are hosts to a multi-national enterprise have employed theories that regard the local subsidiary as part of a unitary enterprise, drawing the conclusion that all of the assets of the enterprise should be reachable for the obligations of the subsidiary."

It is small wonder that the United States Representative to the United Nations Commission on Transnational Corporations wrote that the United States multinational enterprise was "at bay," Rubin, *The Multinational Enterprise At Bay, supra,* or that Congress felt a "compelling" need to ensure that State instrumentalities could be sued only for their own acts, and that the foreign law establishing their separate juridical status be respected.

There is no indication in the FSIA or its legislative history that Congress intended anything else in § 1607, the counterclaim exception to an instrumentality's immunity from suit. To the contrary, the House Report stressed that in allowing a setoff on a claim unrelated to the transaction sued upon by the plaintiff, subsection (c) merely "codifies the rule enunciated in *National Bank v. Republic of China,* 348 U.S. 356 (1955)."

H.R. Rep., *supra,* at 23. The rule of *Republic of China* has nothing to do with the separate status of government corporations. There, the plaintiff foreign state, the National Government of China (Taiwan), claimed and was recognized to hold legal title to the funds on deposit with Citibank and sought to recover the monies for itself. See in particular Republic of China's brief in this Court at 6-7. Further, any intent to subject instrumentalities to counterclaims for the acts of the State but not to suit or execution for such acts surely would have been expressly noted by Congress.

Moreover, the policy reasons Congress found "compelling" are fully applicable to counterclaims. The response of foreign countries surely would be no different if the corporate veil of their instrumentalities was pierced in the context of a counterclaim rather than upon an execution proceeding. The only difference is that the counterclaiming defendant and not the sheriff seizes the assets of the corporation to satisfy claims against the State. Further, even if foreign countries would pierce the corporate veil of United States corporations only for counterclaims, there would be extraordinary and incalculable consequences. United States corporations and their subsidiaries would be left as institutions without any legal recourse as separate juridical entities. It is difficult to see what would be left of the corporate form or how trade could be conducted on such a basis.

There is nothing inconsistent with respondent's construction of the FSIA in the passage from the legislative history, cited by petitioner, H.R. Rep., *supra,* at 12, stating that the FSIA is "not intended to affect the substantive law of liability . . . or the attribution of responsibility between or among entities of a foreign state; for example, whether the proper entity of a foreign state has been sued, or whether an entity is liable in whole or in part for the claimed wrong." H.R. Rep., *supra,* at 12. Immunity is not the same thing as "liability" or "attribution of responsibility," and an instrumentality's liabilities on the merits (if reached) does not argue at all for the proposition that Congress intended to deprive an instrumentality of immunity.[20]

20 Moreover, there is nothing in the FSIA precluding an instrumentality being held liable on traditional principles of agency, assignment, joint

If there is any latitude in the statute's immunity provisions, the legislation nonetheless must be seen as upholding the immunity of respondent for the acts of the State. Similarly, the policy decisions of Congress reflected in the FSIA would apply with undiluted force to this litigation. Being comparable to other government corporations, Bancec cannot be treated differently without providing the precedent which Congress feared.

Moreover, Congress was concerned that "disparate treatment" of foreign governments and instrumentalities "may have adverse foreign relations consequences" and sought to "promote a uniformity in decision . . ." H.R. Rep., *supra,* at 13. It was also aware of the need for "predictability" in commercial negotiations and dealings. *FSIA Hearings, supra,* at 80, 88. The only way these goals can be achieved on the separate entity issue is to make the juridical status of the entity under foreign law the sole criterion and it appears that this is precisely what Congress did. If aberrant government corporations nonetheless may be treated differently, then the abberations must indeed be extreme and obviously so.

Finally, Congress recognized that "sovereign immunity is a doctrine of international law" and its intent was to provide a "statutory regime which incorporates standards recognized under international law." H.R. Rep., *supra,* at 7-8, 14. *See also, id.* at 7-8, 17-18, 22, 27; *FSIA Hearings,* 28, 54-56. As shown *post,* the international law of sovereign immunity supports respondent's reading of the FSIA.

B. International Law Requires Respect of Respondent's Separate Status

Remarkably, neither petitioner nor the United States discuss international law. Yet "international law is part of our law and

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liability or the like. Those principles of "attribution of responsibility" subject a corporation to liability for the acts of another on grounds consistent with its separate juridical status. Thus, Congress in the more particularized comments on the FSIA found in the House Report noted that a court might find that property "held by one agency is really the property of another" or of the State. H.R. Rep., *supra,* at 28, 30. An example is provided by the decision of the court below in *Banco Nacional de Cuba v. Chemical Bank New York Trust Co.,* 658 F.2d 902 (2d Cir. 1981).

must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana,* 175 U.S. 677, 700 (1901).

"Questions of right" are dependent upon international law here for several reasons. The separate status of state instrumentalities is a corrollary to the international law of sovereign immunity. Even viewed apart, the status of state instrumentalities necessarily involves the relations of nations *inter se*—the principal subject of international law. *Restatement of Foreign Relations Law* (Revised) (Tent. Draft No. 1, 1980) (hereafter *Restatement*) at 13-24. Moreover, when nations repeatedly address an issue by their international practice, that issue necessarily becomes a subject of international law. *See, Filartiga v. Peña - Irala,* 630 F.2d 876 (2d Cir. 1980), and Brief for the United States as *Amicus Curiae* in *Filartiga, reprinted in,* 19 Int'l Legal Mat. 585 (1980). Finally petitioner's counterclaim is itself based upon international law. In the absence of a controlling international agreement, "resort must be had to the customs and usages of civilized nations" to determine the rule of international law. The *Paquete Habana,* 175 U.S. at 700; *Restatement* § 102, 25-35.

The precipitating event in this area of international practice was the Soviet Union's creation of state trading organizations with their own juridical status and property under Soviet law, and the practice of those organizations to claim immunity at least on occasion in the 1920's. *FSIA Hearings, supra,* at 56. Unsettled questions as to their liabilities and immunities were resolved by an extensive network of bilateral treaties, which waive the immunity of the trading organizations for their own transactions *and* recognize that the organizations and their property are not subject to claims arising from the activities of the State.[21]

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21 See the treaties of the USSR with Yemen, 672 U.N.T.S. 322 (1963); Brazil, 646 U.N.T.S. 277 (1963); Ghana, 655 U.N.T.S. 171 (1961); Germany, (FR), 346 U.N.T.S. 96 (1958); Iraq, 328 U.N.T.S. 126 (1958); Japan, 325 U.N.T.S. 72 (1957); United Arab Republic, 687 U.N.T.S. 221 U.N.T.S. 79 (1951); Italy, 217 U.N.T.S. 181 (1948); Switzerland, 217 U.N.T.S. 97 (1948); Finland, 217 U.N.T.S. 3 (1948); Belgium & Luxembourg, 173 L.N.T.S. 169 (1935); Latvia, 68 L.N.T.S. 321 (1927); Germany, 53 L.N.T.S. 85 (1926);

These treaties are central to the creation of the restrictive theory of immunity as international law. "A body of rules [of international law] could only have developed with the consent of those concerned. . . ." *Barcelona Traction,* 1970 I.C.J. at 47. *See also, Restatement, supra,* at 15. Further, the practice of states forming customary international law must include the practice of states whose interests are especially affected. *North Sea Continental Shelf Cases,* 1969 I.C.J. 3, 42-43. Thus, the Federal Constitutional Court of the Federal Republic of Germany held in *Claim Against Empire of Iran,* 45 I.L.R. 57, 75 (1963) that these treaties are not "exceptional provisions" but must be rather "appreciated as embodying *rules* which take appropriate account of the fact of Russian State trading and as an expression of the attempt to match international law to the changed realities in international relations." These and similar bilateral treaties were an important part of the state practice which allowed the court to find the "restrictive theory" of immunity part of customary international law. *Id.* at 61, 73-75.

The treaty practice of the United States is to the same effect. The eleven Treaties of Friendship, Commerce and Navigation negotiated in the post-War period treat each state enterprise as a separate entity, waive the immunity of the enterprise only for claims arising from its own activities and do not waive the immunity of the State itself for the activities of those enterprises.[22]

The judicial practice has been to the same effect. The civil law countries hold that foreign entities owned or controlled by

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Austria, 20 L.N.T.S. 153 (1923); Denmark, 18 L.N.T.S. 15 (1923); Norway, 7 L.N.T.S. 293 (1921) and Sweden, 127 B.F.S.P. 88 (1927); and the treaties of Switzerland with Czeckoslovakia, 1954 R.O. 745; Roumania, 1951 R.O. 827; Hungary, 1950 R.O. 612; and Poland, 1949 R.O. 832. Comparable provisions are found in treaties of the Soviet Union with other socialist countries as well. *See* treaties with People's Republic of Korea, 399 U.N.T.S. 3 (1960); People's Republic of Vietnam, 356 U.N.T.S. 149 (1958); People's Republic of China, 313 U.N.T.S. 135 (1958); Albania, 313 U.N.T.S. 201 (1958); Geman Democratic Republic, 292 U.N.T.S. 75 (1957); Bulgaria, 217 U.N.T.S. 97 (1948).

22 *See, Gibbons v. Rep. of Ireland,* 532 F. Supp. at 672; Brief for the United States at 25 in *Electronic Data Service Corp.*, 610 F.2d 94; Stetser, *The Immunity Waiver for State Controlled Enterprises in United States Commercial Treaties,* Proc. Am. Soc. Int'l L. 89, 100 (1961).

the foreign sovereign but established with separate juridical status under foreign law do not share the sovereign's immunity. U.S. Dept. of State, *The International Law of Sovereign Immunity* 52-55 (1963). Even prior to the FSIA, the courts of the United States recognized the distinction between state enterprises with separate juridical identities under foreign law and the state itself, holding that the former did not share the sovereign's immunity.[23]

The House of Lords recently has spoken directly to the issue presented here and in a manner emphatically supporting respondent. In *C. Czarnikow, Ltd. v. Centrala Handlu Zagranicznego Rolimpex,* [1978] 3 W.L.R. 274, the House of Lords considered whether Rolimpex, a Polish state exporter, could invoke *force majeure* on the basis of the government's refusal to grant it an export license. Refusing to consider Rolimpex the *alter ego* of the government, or the government the real party in interest on the contract, the House of Lords rejected the disappointed purchaser' contention that in reality the Polish government was improperly claiming "superior force" on the basis of its own acts.

Most significantly, the House of Lords has reached the same result with regard to *respondent's successor,* Cubazucar, and the Cuban state shipping corporation, *I Congreso del Partido,* [1981] 3 W.L.R. 328, holding that the Cuban state corporations

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23 *Coale v. Society Co-Operative Suisse des Chabons,* 21 F.2d 180 (S.D.N.Y. 1921); *United States v. Deutsches Kalisyndikat Gesellschaft,* 31 F.2d 199 (S.D.N.Y. 1929); *Tringali v. Tug Pemez XV,* 274 F. Supp. 277 (S.D. Tex. 1967); *The Beaton Park,* 65 F. Supp. 211 (W.D. Wash. 1945). *See, Ulen & Co. v. Bank Gospodarstwa Krajowego,* 261 App. Div. 1, N.Y.S. 2d 201 (2d Dept. 1940); *Compare,* where the defendant did not have a juridical personality of its own, *Dexter and Carpenter v. Kunlig Jarnvagsstyrelsen,* 43 F.2d 705 (2d Cir. 1930), *cert. denied,* 283 U.S. 896 (1930); *Oliver American Trading Co. v. Government of United States of Mexico,* 5 F.2d 659 (2d Cir. 1924); *Bradford v. Dir. General of Railroads of Mexico,* 278 S.W. 251, 252 (C.A. Tex. 1925). In *In re Investigation of World Arrangements,* 13 F.R.D. 280 (D.D.C. 1952) the court did hold a foreign commerical corporation was entitled to sovereign immunity but its holding was explicitly rejected by the Justice Department. U.S. Dept of Justice, Antitrust Div. *Antitrust Guide for International Operations* (rev. ed. March, 1, 1977), *reprinted in,* 1977 Antitrust & Trade Reg. & Rep. (BNA) No.-799, at E-1, 27.

are not the *alter egos* of the State and the State is not to be considered a party or principal on their commercial dealings. The rule of law stated is not dependent on an evaluation of the corporations' relative degree of autonomy but on the acceptance of state corporations in modern international practice:

> State controlled enterprises with legal personality, ability to trade and to enter into contracts of private law, though wholly subject to the control of their state [which also provides 'all the funds necessary for its operation'], are a well-known feature of the modern commercial scene. The distinction between them, and their governing state, may appear artificial but it is an accepted distinction in the law of English and other states [citing *Rolimpex*].'

The position of petitioner and the United States is irreconcilable with the result and the rule of law reached by the House of Lords.

This is more than sufficient state practice to establish a binding rule of customary international law.[24]

"General principles of law" recognized by the world's major legal systems are an independent if secondary source of international law. Art. 38(1)(c) of the Statute of the International Court of Justice; *Barcelona Traction*, 1970 I.C.J. at 33-34; *Restatement*, *supra*, § 102, 28-29. Further, "[t]hat a principle is common to the major legal systems may be per-

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24 A rule emerges when there is a sufficiently general and consistent practice (even if not universal or uniform), followed from a sense of legal obligation, to indicate its acceptance. Restatement, *supra* at 25, 30-31. Thus, the necessary amount of practice is properly considered a relative, not absolute, question. Limited but uniform practice may be sufficient in the circumstances to show acceptance while a greater number of confirming instances may be necessary to overcome conflicting practice. *See*, Akehurst, *Custom As A Source of Int'l Law*, [1974-75] 47 Brit. Y.B. Int'l L. 1, 12-19. A wide network of similar bilateral arrangements is a source of customary law and, as such, is binding upon non-parties. *Restatement*, *supra*, at 26; *Filartiga v. Pena-Irala*, 630 F.2d at 876, and *Filartiga* Brief for United States *supra*, 596 n.28 (1980); *D'Amato, The Concept of Custom in International Law*, 103, 124-8 (1971). States that indicate their disagreement with a practice *while* customary law is still in formation are not bound by the custom as it emerges, but otherwise are. *Restatement* at 25-26; *Fisheries Jurisdiction Case*, 1974 I.C.J. at 131; Akehurst, *supra*, at 23-27.

suasive in determing whether it has become a rule of customary law . . ." *Restatement, supra*, at 35; *Appeal Relating to the Jurisdiction of ICAO Council*, 1972 I.C.J. 46, 109 (sep. opinion of Judge Dillard). Prof. Wolfgang Friedmann concluded the 1954 volume, *The Public Corporation: A Comparative Symposium* by stating that "at least the present study should have established that the public corporation must now rank among the 'general principles of law recognized by civilized nations'", quoting Art. 38(1)(c) of the Statute of the International Court of Justice. Consideration of public corporations as they have proliferated in the twenty-five years since Prof. Friedmann wrote places his conclusion beyond dispute. The essence of the public corporation in 1954 and now is that it is responsible only for its own activities and debts and not those of the State.[25]

Just as there is no basis in the FSIA for considering nationalization claims differently, so too there is no basis in international law for disregarding the separate status of state corporations especially for nationalization claims. When, as here, there is an existing rule supported by substantial practice, a great deal of contrary practice is necessary to call the rule into doubt or to create exceptions. Akehurst, *supra*, at 19. No contrary practice at all has been shown and there appears to be none.

There have been instances in international practice of pooling the assets of state instrumentalities (and indeed, of private nationals) into a lump sum with other assets to satisfy nationalization claims. However, this has been done as part of a general settlement of claims between the states and their nationals, and the lump sum has been distributed by the United States to all claimants pursuant to a scheme established by the

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25 *See* Appendix A to the Brief; Friedmann, *Government Enterprise: A Comparative Analysis* in Friedmann & Garner, eds., *Government Enterprise* 314 (1970); U.N. Department of Social Affairs, *Organization, Management and Supervision of Public Enterprises in Developing Countries* 64 (1974); Knapp, *The Function, Organization and Activities of Foreign Trade Corporations in the European Socialist Countries* in Schmitthoff, ed., *Sources of the Law of International Trade* 52 (1964).

appropriate political branches.[26] No principle of international law relevant here could possibly be established by such instances. The principal discernible consideration has been a general resolution of disputes on the basis of consent. Beyond that, the factors weighed and the balances struck in each situation were uniquely political and neither judicially manageable or discernible. This Court has recognized as much. *See, United States v. Pink,* 315 U.S. 203 (1942); *Dames and Moore v. Regan,* 453 U.S. 654 (1981). The International Court of Justice in *Barcelona Traction,* 1970 I.C.J. at 41, ruled that such lump-sum settlements provided no basis for disregarding the corporate identity of even the nationalization claimant, as the agreements resolved specific disputes and were *sui generis.*

There is no bilateral agreement between Cuba and the United States. Moreover, Congress affirmatively has decided to go no further in its absence than freezing the funds in this country of the Cuban State, its instrumentalities and nationals and administratively certifying nationalization claims. The purpose of the certification procedure is to assist the Executive in any negotiations with Cuba and provide an equitable basis upon which the lump-sum of the frozen assets (and any additional sums) might ultimately be distributed to United States claimants.[27] When establishing the certification procedure, the political branches considered but rejected a proposal to vest and distribute the assets in the absence of a settlement.

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26 *See, e.g.,* the discussion of such programs in *United States v. Pink,* 315 U.S. 203 (1942); *Sardino v. Federal Reserve Bank,* 361 F.2d 106 (2d Cir. 1966), *cert. denied,* 385 U.S. 898 (1966); 1972 *Annual Report of the Foreign Claims Settlement Commission* and Lillich and Weston, *International Claims: Their Settlement by Lump-Sum Agreements,* (Vols. 1 and 2, 1952). In effect, this was what the political branches achieved in the Iranian situation as well by freezing the assets of both the Iranian state and Iranian state enterprises, and pooling and transferring a portion of them pursuant to the Algerian Declarations to secure awards of the International Tribunal. *See, Dames and Moore v. Regan,* 453 U.S. 654 (1981).

27 *See,* Cuban Assets Control Regulations, 31 C.F.R. § 515; 22 U.S.C. § 1643; *Banco Nacional de Cuba v. First National City Bank,* 431 F.2d 394 (2d Cir. 1970), *jud. vac.* and *remanded,* 400 U.S. 1019 (1971), *on remand,* 422 F.2d 530 (2d Cir. 1971), *rev'd and remanded* 406 U.S. 759, *reh. denied,* 409 U.S. 897, *on remand,* 478 F.2d 191 (2d Cir. 1973).

Annual Report, Foreign Claims Settlement Commission of the United States 70 (1972). Moreover, Congress repealed in the next session the more limited measure it had adopted of ordering the liquidation of enough of the frozen assets to cover the administrative costs of the certification program. Congress was persuaded by the Executive's argument that, in the absence of a bilateral settlement, any vesting would be inconsistent with the position of the United States insisting upon protection of property rights under international law.[28]

There are also war-time measures freezing or vesting the assets of corporations on the basis of the nationality of the corporations' owners. This has been properly characterized as an aspect of "economic warfare", justified on the ground that the "purpose of the trading with the enemy legislation, designed to deprive the enemy of access or ownership to assets within the jurisdiction of the enacting state, was not to be thwarted by enemies who hid their hostile interests behind the veil of 'friendly' corporations, allied or neutral." Domke, *Piercing the Corporate Veil In The Law of Economic Warfare,* 1955 Wisc. L. Rev. 77. As the International Court of Justice found in *Barcelona Traction,* 1970 I.C.J. at 39-40, these measures cannot provide wider precedent. Further, whether to engage in "economic warfare", and how, is a political, not a judicial, function.

Petitioner's fraudulent scheme theory fares no better. The restrictive theory of immunity and the separate entity principle developed in international law precisely from the trade practices of the Soviet Union and others, which were marketing nationalized property. Further, it is still the case that state corporations frequently sell property which passed into the public sector through disputed nationalizations, whether of the property or of the means of its production. Indeed, much of state trade is precisely in such commodities; oil is a prime example, but only one of several.

State corporations are a *sui generis* institution and there is distinct international practice and law concerning their status.

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28 P.L. 892, 79 Stat. 1988 (89th Cong., 1st Sess. 1965),; S. Rep. No. 701, *Comm. on For. Rel.*, 89th Cong., 1st Sess. (1965), *reprinted in,* 1965 U.S. Code Cong. & Ad. News 3581.

Similarly, the government corporation occupies a unique place in the jurisprudence of the world's major legal systems to which reference may be made as a secondary source of international law. If, nonetheless, reference is also made to the treatment of private foreign corporations, there is further support for respondent's position under international law.

The well established and universal principle of private international law common to every major legal system dictates that the juridical status of a foreign corporation is determined by the law under which that corporation was established, 2 Rabel, *The Conflict of Laws: A Comparative Study,* 31 (1947)[29], *Restatement (Second) of the Law of Conflicts,* § 297; (or in the case of civil law countries, by the law of the state in which the corporation has its center of domicile, 2 Rabel, *supra,* at 33).[30] That common principle of law has also been set forth in an extensive network of bilateral treaties to which the United States and the other major western nations are parties[31] and multilateral treaties,[32] as well as draft conventions on

29 *See also,* Drucker, *Companies in Private International Law,* 17 Int'l & Comp. L.Q. 28, 29 (1968); Hadari: *The Choice of National Law Applicable to the Multinational Enterprise and the Nationality of Such Enterprise,* 1974 Duke L. 1, 7; Hibbert, *International Private Law or Conflict of Laws* 223 (1927).

30 *See also,* Nadelmann and von Mehren, *A French Draft of A Law on Private International Law,* 18 Am. J. Comp. L. 614, 619 (1970); Coester-Waltjen, *Conflict Rules and the Multi-National Enterprise,* 6 Ga.J.Int'l. & Comp. L. 197 (1976).

31 The eleven post-war Friendship, Commerce and Navigation treaties of the United States provide that "Companies constituted under the applicable laws and regulations of one party shall have their juridical status recognized within the territories of the other party." These are but the most recent examples of the consistent treaty practice of the Unites States since the turn of the century. *See* Walker, *Companies* in Wilson, *United States Treaties and Int'l Law,* 182, 184-95 (1960). Other leading industrial and commercial countries, including Great Britian, Greece and Belgium, have actively sought an extensive network of bilateral treaties with comparable provisions since the mid-nineteenth century. Walker, *supra,* at 184-5. Great Britain alone negotiated 63 such treaties with a wide variety of countries in the years before the World Wars.

32 The European Common Market, *Convention on the Mutual Recognition of Companies and Legal Persons,* 2 Com. Mkt. Rep. (CCH) ¶ 6255

private international law.[33] The widespread use of the corporate form in present day international trade has dictated that the legal existence of the corporation, once confined to the state of its creation, be universally and explicitly recognized by other nations. *Sumitomo Shoji America Inc. v. Avagliano*, ___ U.S. ___, 102 S.Ct. 2374, 2380-81. (1982).

The essential element of this international recognition of corporate status is that the liability of a stockholder to the creditors of a foreign corporation is determined by the local law of the state of incorporation. *Restatement (Second) of Conflicts of Laws*, § 307, § 297 comment (c).[34] As this Court has noted, the liability of a stockholder "is an incident of the incorporation," and thus "peculiarly within the regulatory power of . . . the State of incorporation." *Broderick v. Rosner*, 294 U.S. 629, 643 (1935).[35] The conflict rules of New York and other states are in accord.[36]

(1975) (unofficial english translation). *See also*, Goldman, *The Convention Between the Member States of the European Economic Community on the Mutual Recognition of Companies and Legal Persons*, 6 Com. Mkt. L. Rev. 104 (1968).

33 Institute of International Law, *Companies in Private International Law*, (1965), *reprinted in*, 60 Am.J. Int'l L. 523 (1966); *Draft, Inter-American Convention on Conflict of Laws Concerning Commercial Companies, reprinted in*, 21 Int'l Legal Mat. 1222 (1979); *Seventh Hague Conference on Private International Law, Draft Convention Concerning Recognition of the Legal Personality of Foreign Companies, Associations and Foundations*, 1 Am. J. Comp. L. 277 (art. 1, 5) (1952).

34 *See also*, Fletcher, *Private Corporations*, § 6227 at 48; Wharton, *Conflict of Laws*, § 105(b) (2d ed. 1881); Reese and Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 Colum. L. Rev. 1118, 1132, 1134 (1958). For English law to same effect, *see*, Westlake, *Private International Law*, § 308 (6th ed. 1925); Hibbert, *International Private Law or Conflict of Laws*, 223 (1927); *Batemen v. Service*, [1881] 6 A.C. 386.

35 *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531, 542 (1915) also held that the laws of the state of incorporation "were integrally and necessarily the criteria" in determining the rights and liabilities of the shareholders to the corporation. *See also, Converse v. Hamilton*, 224 U.S. 243, 260 (1911); *Risdon I. & L. Works v. Furness'* [1906] 1 K.B. 49; 2 Rabel, *supra*, at 80-82. It is only where the shareholder expressly assented to being governed by the law of another state has this Court applied the law of a state

"Questions arising under what is usually called 'private international law' or the conflict of law . . . is part of our law." *Hilton v. Guyot,* 159 U.S. 113, 143 (1894). *See also, Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 452-53 fn. 14 (1976) (White, J. dissenting). Rules "of impressive maturity and universality" such as the conflict rule at issue here, have "the force of law . . . from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations." *Id.* at 581-82[37] Thus, if reference is made to the principles of private international law, those conflicts principles dictate that Cuban law should apply to determine Bancec's liability. Indeed, from these principles "it follows that the question whether legal personality is bestowed upon a governmental unit, is determined by the state to which it belongs, and by no means according to the *lex fori.*" 2 Rabel, *supra,* at 12.

In the face of the overwhelming unanimity of conflict rules throughout the world community, the United States argues that this choice of law does not apply in the counterclaim situation. The authority cited for this proposition merely notes that in invoking the jurisdiction of a foreign court, a sovereign submits to the procedural rules of the forum. *See,* 6 M. Whiteman, *Digest of International Law* 709 (1968). However, where "what is apparently mere matter of remedy touches the substance of the controversy [and] becomes a matter of right", the claim is governed not by the law of the forum, but by the appropriate law under conflict principles. *Pritchard v. Morton,* 106 U.S. 124, (1882). Thus, the *Restatement (Second) of Conflict of Laws* § 125 provides that "[t]he local law of the

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in which the business was conducted. *Thomas v. Matthiessen,* 232 U.S. 221 (1914), *Pinney v. Nelson,* 183 U.S. 144 (1901).

36 *Ministers & Mission Ben. Bd. of ABS v. McKay,* 64 Misc. 2d 231, 315 N.Y.S. 2d 549, 561 (Sup.Ct. N.Y. 1970); *Debs Memorial Radio Fund Inc. v. Lomenzo,* 50 Misc. 2d 51, 269 N.Y.S. 2d 634, (Sup.Ct. Albany 1966); *see also* 18 C.J.S. *Corporations* § 619.

37 In *Hilton,* the Court's refusal to give conclusive effect to a French judgement was founded precisely upon "the principles of international law recognized in most civilized countries." 159 U.S. at 168.

that "[t]he local law of the forum determines who may and who must be parties to a proceeding *unless the substantial rights and duties of the parties would be affected by the determination of this issue.*" (emphasis added).

The United States also argues that the commercial transactions underlying Bancec's claim had substantial contacts with the United States. However, the choice of law must be made with respect to the particular issue to be decided. *See, e.g., Restatement (Second) of Conflict of Laws* § 188, comment (d). Here the issue does not concern the terms of the letter of credit or the like, but the corporate status of respondent. That Bancec engaged in an international transaction cannot change the conflicts principle designed precisely for transactions involving several jurisdicitons.

Normal conflicts rules could be disregarded here, if at all, only upon the premise that the creation of respondent was in violation of international law, as that act of state was done fully within the territory of Cuba. Even under the dissent in *Banco Nacional de Cuba v. Sabbatino,* only international law and not the public policy of the forum can be invoked in such a situation. 376 U.S. at 445-46, 457-59 (White, J., dissenting). Likewise under that view, the *lex loci* (here, the law of Cuba) determines whether respondent obtained title to the sugar as a separate entity. It cannot be maintined that the creation of respondent or the transfer of title to it was in violation of international law.[38] Further, there is nothing in *First National City Bank v. Banco Nacional de Cuba,* 406 U.S. 759 (1972) suggesting that the conflicts principles articulated in the *Sabbatino* dissent are not fully applicable in the context of a counterclaim supported by the United States government. *See also, Restatement (Second) Foreign Relations Law of the United States,* § 41(h).

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38 Since respondent had title to the sugar in Cuba, the sugar's subsequent export has no effect upon these conflicts principles and they must be given effect in an action to recover the proceeds in the forum. *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 445 (White, J., dissenting); *Ricaud v. American Metal Co.,* 246 U.S. 304, *Compare, Tabacalera Severino Jorge, S.A. v. Standard Cigar Co.,* 392 F.2d 706 (5th Cir. 1968), *cert. denied,* 393 U.S. 924, relied upon by the United States, where the property was in the forum at the time of the relevant act of state.

Finally, even if the concept of public policy is relevant, that concept is "narrower and more limited in private international law than in internal law"[39]; it requires reference to fundamental, widely-held principles of justice and not simply the policy of the forum.[40]. Even aside from conflicts principles, public policy must be something more fundamental and broader than simply differences of law or a court's equitable notions.[41]

Strong federal policy, contained both in the FSIA and in international law, recognizes the separate juridical status of a foreign corporation under foreign law. Petitioner and the United States have sought to present conflicting policy considerations. However, fundamental public policy cannot possibly be determined by a weighing of conflicting interests and policies. It is only where the public policy is so clear and deep-rooted that it cannot tolerate the application of foreign law that the forum may refuse to give effect to foreign law. When, as here, policies are at most conflicting, foreign law cannot be disregarded.

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39 Cheshire, *Private International Law* 155 (6th ed. 1961).

40 The Convention Between the Member States of the European Economic Community on the Mutual Recognition of Companies & Legal Persons, 2 Com. Mkt. Rep. (CCH) ¶ 6083 (1968), provides for an exception to the rule that a corporation's status is determined by the law of its situs only when the company "violates through its objects, its aims, or its actual conduct, principles or rules which the said [forum] State considers as public policy in the private international law sense of the term." *See also*, Goldman, *supra*, at 111. Similarly, the German, French and Italian conflicts rules provide that foreign laws need not be applied when they are "manifestly incompatible with the *ordre public* as understood in international relations." Nadelmann & von Mehren, *supra*, at 617; McCusker, *The Italian Rules of Conflict of Law*, 25 Tulane L.Rev. 70, 86 (1950), Stein, *Conflict-of-Law Rules by Treaty: Recognition of Companies in A Regional Market*, 68 Mich. L. Rev. 1327, 1348-49, n.93 (1970).

41 *Hausman v. Buckley*, 299 F.2d 696, 705-06 (2d Cir. 1962); *Cheshire, supra*, at 156; *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918); *Intercontinental Hotel Corp. v. Golden*, 15 N.Y.2d 9, 16, 254 N.Y.S. 2d 527, 532. *See also, Restatement (Second) of Conflict of Laws* §90.

III

ANY RULE OF FEDERAL COMMON LAW CREATED HERE MUST RESPECT RESPONDENT'S SEPARATE STATUS

Respondent has argued that the FSIA and international law provide the rule for decision here. If they do not, the Court must consider whether it may properly exercise its power to make federal common law and to what effect.

The prior discussion discloses several federal policies and concerns. Congress has recognized "compelling" reasons to avoid any precedent in the treatment of foreign government corporations which might lead foreign countries to disregard the separate status of United States corporations and their subsidiaries or to retreat from an acceptance of the restrictive theory of sovereign immunity as part of international law. Congress also recognized a need to avoid disparate treatment of the state instrumentalities of different countries. There is as well a federal policy opposing depletion of the frozen Cuban funds.

Petitioner and the United States are unable to point to any federal policy favoring the position of petitioner. The statutory provisions cited by the United States express a Congressional policy against unlawful nationalizations and have no implications for the status of state instrumentalities.[42] Indeed, the United States concedes as much when, turning from the statement of its interests to its proposal for a federal common law rule, it asks the Court to draw upon domestic, court-made principles fashioned for private individuals.

The only viable rule of law consistent with federal policies is to make foreign law controlling on the issue presented here. Further, respondent is sufficiently similar to the generality of state instrumentalities for any adverse result on its status to

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42 22 U.S.C. 2351(b) (4) and (6) (empowering the President to take steps to withhold foreign assistance expropriations by countries receiving foreign assistance); 22 U.S.C. 2370(e) (1) (requiring suspension of foreign assistance to countries that expropriate American property without timely compensation); 22 U.S.C. 2372(e) (2) (restricting application of act of state doctrine to allow determination of rights in nationalized property brought into the United States).

have broad precedential effect. In the well-founded calculation of Congress, the separate status of United States corporations and their subsidiaries, already at bay, would be undermined. This Congressional expression of policy must be given preeminent consideration. It is directly to the point, clear and, in Congress' judgment, "compelling."

Further, any insecurity as to the status of their instrumentalities may lead foreign governments to call into question their decision not to claim sovereign immunity for state instrumentalities or their decision to conduct trade through such instrumentalities rather than through the State itself, which enjoys vastly enhanced immunities. In addition to being met with increasing claims of immunity, those who deal with state instrumentalities would be made insecure in that the instrumentality's capital might be depleted or extinguished by an unpredictable and crushing liability arising from the acts of the state or other instrumentalities. Such insecurities as to immunity and liability might lead to a disinclination to do business and almost surely to an effort by both parties to readjust the terms of trade, including efforts by the foreign instrumentality to keep assets outside the United States. The United States expressed the same concern in 1979 in its brief *amicus curiae* in *Electronic Data Systems Corp.* v. *Soc. Sec. Org. of Iran*, 610 F.2d 94 (2d Cir. 1979). For all these reasons, the scholarly authority of diverse ideologies has maintained that international trade requires respect for the separate status of trading instrumentalities.[43]

This Court exercises any law-making power it has by reference to Congressional policies, *Willis* v. *Pan-American Pet. Corp.*, 384 U.S. 63, 69 (1966); *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 456 (1957), including statutes "dealing with the general subject," *Willis*, 384 U.S. at 69. It cannot make law which requires "initial policy determinations of a

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43 *See*, for example, Knapp, *supra*; Berman, Harold J., *The Legal Framework of Trade Between Planned and Mixed Economies: Soviet-American Example*, 24 Law and Contemporary Problems, 482, 498 (1959); Pisar, Samuel, *Coexistence in Commerce: Guidelines for Transactions Between East and West*, 262-68 (1970).

kind clearly for non-judicial discretion." *Baker* v. *Carr,* 369 U.S. 186, 217 (1964); *United States* v. *Standard Oil Co.,* 332 U.S. 301, 313-16 (1947).

The policies discussed above all favor respect for respondent's juridical status. If there are to be exceptions or modifications to those policies, allowing disregard of the separate status of state instrumentalities in certain situations or for certain instrumentalities, they are not for this Court to make. Congress has not articulated any competing considerations or a standard by which a balance between such considerations could be struck. Further, a court cannot assess the risks of any new rule of law allowing disregard of a state corporation's separate status, let alone whether those risks should be run. A broad range of economic and political inquiries would be required.

As this Court has recently reiterated:

> "The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts."

Texas Industries, Inc. v. *Radcliff Materials, Inc.,* 451 U.S. 630, 647 (1981), *quoting Diamond* v. *Chakrabarty,* 447 U.S. 303, 317-18 (1980).

That petitioner and the United States urge the Court to draw on domestic law principles cannot disguise the nonjusticiable nature of the task they set. As in *United States* v. *Standard Oil Co.,* 332 U.S. at 314, reference to established legal principles cannot justify making federal common law because:

> the analogy is brought forth, indeed, not to secure a new step forward in expanding the recognized area for applying settled principles of that law as such, or for creating new ones. It is advanced rather as the instrument for determining and establishing the federal. . .policies

> which the Government's executive arm thinks should prevail in a situation not covered by traditionally established liabilities. Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours.

There is no need to reconcile the varying views expressed in *Sabbatino*, *First National City Bank* and *Dunhill* to conclude that this is an inappropriate case for the exercise of the Court's authority to make federal common law. All the factors found troubling in varying degrees in those decisions are here and perhaps more so. The validity and effect of a foreign law is challenged. The practice of a broad range of nations—indeed, almost the entire community of nations—is involved. The issue is one which many states see as deeply affecting their sovereignty and their fundamental aspirations. The structure and stability of a large portion of international trade is called into question. The issues presented can only be addressed on a piecemeal basis by a court, yet are capable of being addressed systematically by a broad international process. The Executive is not disinterested in the result.

Yet, the task presented here is far more difficult and unorthodox for a court. In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 428, the Court doubted that the courts of the United States properly should or could adjudicate issues of international law where the degree of codification or consensus did not permit it to "focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice." It doubted, as well, that decisions by United States courts in such circumstances would be seen as a disinterested articulation of law. The dissent was more sanguine as to the clarity of the international law to be applied in that case but acknowledged that "where a clear violation of international law is not demonstrated" a court should not reach the merits. In *First National City Bank*, an adjudication of that assertedly "clear violation" was permitted. In *Dunhill*, the confidence in the courts of the United States to pronounce on the "commercial" acts of foreign states expressed in Point III of Mr. Justice White's

opinion rested in large measure on the perception that "more discernible rules of international law have emerged with regard to the commercial dealings of private parties in the international market." *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. at 704. Here, petitioner and the United States do not seek a ruling on the basis of international or any other neutral, pre-existing body of law but ask that this Court decide the case on the basis of a rule it would fashion in consideration of national interests.

An additional factor to be considered is the effect of an adverse decision on the fund of frozen Cuban assets. In *First National City Bank* v. *Banco Nacional de Cuba*, this was not sufficient to tip the balance, although the lower court had thought it weighty. Here, the Court is not compelled by its traditional function of adjudicating the legal rights of parties under existing law, but is asked to reach out and fashion a rule of common law to achieve policy objectives. Yet such federal policies as may be relevant here are adequately served by any recovery being frozen and this Court need not formulate a rule of law to cover other situations. The Court should deny the equitable relief sought, or abstain from reaching the merits, on the ground of the funds being frozen. By doing so, the Court would neither set precedent on the merits nor eschew the possibility of its creating a rule of federal common law in the future. *Cf.*, Bickel, *The Supreme Court, 1960 Tern—Forward, The Passive Virtues*, 75 Harv.L.Rev. 40, 46 (1961); Henkin, *Is There A Political Question Doctrine?*, 85 Yale L. J. 597, 617-20 (1976).

IV

TO THE EXTENT RELEVANT, DOMESTIC LAW SUPPORTS RESPONDENT

The Foreign Sovereign Immunities Act states:

> As to any claim for relief with respect to which a foreign state is not entitled to immunity under Section 1605 or Section 1607 of the chapter, the foreign state shall be

> liable, in the same manner and to the same extent, as a private individual under like circumstances. . . .

28 U.S.C. § 1606. Drawn from the identical language of the Federal Tort Claims Act, 28 U.S.C. § 2674, the provision, where applicable, requires application of state law, including its conflicts rules. *Cf. Richards v. United States*, 369 U.S. 1 (1962).

In urging the creation of a rule of federal common law, petitioner and the United States apparently believe that § 1606 is inapplicable to the issue presented here. Presumably, their reasoning is that Congress did not intend by this provision to treat issues inextricably intertwined with foreign relations as if they involved private persons *and* that the issue presented here is such an issue.

This reasoning strongly supports respondent's immunity argument. Only through the Act's immunity provisions could Congress have been confident that § 1606 would not be applied to a question it believed fraught with danger for United States interests, that is, whether to disregard the separate corporate status of foreign instrumentalities.

Petitioner's and the United States position also undermines their reliance on domestic law principles in proposing a rule of federal common law. If the issue presented is sufficiently distinctive to be beyond the reach of § 1606, so too is it beyond useful reference to the domestic law principles governing "private persons under like circumstances."

If § 1606 applies, then it requires application of New York law. New York is the forum state and the only state concerned with the transaction. New York law does not support petitioner's and the United States position on the merits. In fact no domestic law principle supports their position.

A. Conflicts of Law Principles Require Application of Cuban Law

Respondent has already shown that conflicts principles require application of Cuban law. The only other substantive law which could conceivably apply is New York law, which also supports respondent.

B. General Principles of Corporate Law, Including New York Law, Prohibit Piercing Respondent's Corporate Veil

Limited liability "is fundamental to the very concept of the corporation as a separate legal entity." *Lowendahl v. Baltimore & Ohio R.R. Co.*, 247 App. Div. 144, 154, 287 N.Y.S. 62 (1st Dept. 1936), *aff'd* 272 N.Y. 360, 6 N.E.2d 56 (1936). Respect for the separate legal status of corporations is thus "accepted in theory and in practice and ingrained in our legal and economic systems. Courts will not lightly disregard the corporate entity." *Id.* This Court, like the New York courts, will disregard the separate entity of a corporation "[o]nly under exceptional circumstances." *Burnett v. Clark*, 287 U.S. 410, 415 (1932).

New York has adopted a tripartite test for piercing the corporate veil of an instrumentality:

> (1) Control, not merely majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and
>
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Lowendahl v. Baltimore and Ohio R.R. Co., 247 App. Div. at 157. The *Lowendahl* test is "now nearly universally accepted. . . ." *United Paperworkers International Union v. Penntech Papers*, 439 F. Supp. 610, 618 (D. Me. 1977), *aff'd* 583 F.2d 33 (1st Cir. 1978).

The facts of this case fail utterly to satisfy any of the three prongs of the *Lowendahl* test. First, the requisite domination, the only issue even addressed by petitioner and the United States, does not exist. In *NLRB v. Deena Artware*, 361 U.S. 398, 403 (1960), this Court, recognizing limited liability as the "norm", quoted the opinion of Judge Cardozo in *Berkey v.*

Third Avenue Railroad Corporation, 244 N.Y. 84, 95, 155 N.E. 58 (1926):[44]

> Dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent. Where control is less than this, we are remitted to the tests of honesty and justice. 361 U.S. at 403.

This Court indicated that, to determine domination, courts should consider: whether the subsidiary "is only a shell, inadequately financed;" whether "the affairs of the [corporations] may be so intermingled that no distinct corporate lines are maintained;" whether the several companies are represented as one; whether in fact the economic enterprise is one, "the corporate forms being largely paper arrangements that do not reflect business realities;" and whether the subsidiary is "operated as a division of" the parent. *NLRB v. Deena Artware*, 361 U.S. at 403-04.

None of these criteria are present here. Indeed, petitioner and the United States rest their conclusory allegations of total domination and control only on the ground that Bancec was wholly owned by the Republic and that the directors of Bancec were government officials. Yet ownership of all stock and interlocking directorates are *never* a sufficient predicate for *alter ego* liability. *CM Corp.* v. *Oberer Development Corp.*, 531 F.2d 536, 539 (7th Cir. 1980). In *Deena Artware*, the parent corporation owned all the subsidiary stock, and all the officers and directors of both companies were the sole stockholder of the parent corporation, his wife, his son and his secretary. 361 U.S. at 399-400. Nevertheless, this Court remanded the case for further consideration. Were ownership and interlocking directorates sufficient to disregard the corporate entity, the exception would swallow the rule. No wholly-owned subsidiary or closely-held corporation could ever be considered a separate entity. *Lowendahl*, 247 App. Div. at 156.

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44 All three prongs of the *Lowendahl* test were satisfied by the NLRB's allegations in *Deena Artware*. *See*, concurring opinion of Justice Frankfurter, joined by Justice Harlan, 361 U.S. at 404-410.

Petitioner and the United States fall into the analytical trap which Judge Cardozo foresaw:

> The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor. Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it. We say at times that the corporate entity will be ignored when the parent corporation operates a business through a subsidiary which is characterized as an 'alias' or a 'dummy'. All this is well enough if the picturesqueness of the epithets does not lead us to forget that the essential term to be defined is the *act of operation.*

244 N.Y. at 94-95 (emphasis added).

Cardozo distinguished *Davis v. Alexander*, 269 U.S. 114 (1925), relied upon by petitioner and the United States here. *Davis* held a railroad company liable for the injury which occurred on lines owned by its subsidiary on the ground that the parent "actually controlled the subsidiary and operate[d] both as a single system." 269 U.S. at 117. Cardozo noted that the record on appeal in that case revealed that the revenues from the operation of both companies were comingled in a single fund and that property and personnel were used indiscriminately. No pretense at corporate separateness was maintained. 244 N.Y. at 94.[45]

Moreover, even assuming *arguendo* that the state controlled Bancec, such control was not, as required by the first prong of the *Lowendahl* test, "in respect to the transaction attacked," *i.e.*, the nationalization of the Cuban branches. Nor, as required by the second prong of the test, was the alleged control of Bancec used by the Republic to "commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's rights." Finally, any alleged control of Bancec was not,

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45 Respondent in *Davis* argued that liability should be predicated on principles applicable only to the conduct of railroad companies. Neither respondent nor this Court cited any authority other than cases affecting railroads. *See* Brief of Defendants-in-Error at 21; 269 U.S. at 117.

as required by the third prong, the proximate cause of petitioner's injury and, indeed, was wholly unrelated to it.

Even persuasive evidence of domination and control of a subsidiary by its parent will not justify imposing liability on the parent unless that control was exercised at the time of, and in connection with, the act in question. *Atlantic Management Corporation v. American Casualty Co.*, 141 F.2d 108, 110-11 (3d Cir. 1934), *quoting Lowendahl*, 287 N.Y.S. at 79. Neither petitioner nor the United States cites a single case in which the corporate entity to be disregarded was unrelated to the injury, as Bancec is to the nationalization of petitioner's branches here. Indeed, because there must be a nexus between injury and control, Judge Learned Hand, in *Kingston Dry Dock Co. v. Lake Champlain Transportation Co.*, 31 F.2d 265 (2d Cir. 1929), doubted that a subsidiary could ever be liable for an act done by the parent, the situation at bar. 31 F.2d at 267. *See also*, Fletcher, *Cyclopedia of The Law of Private Corporations* (1974), § 43.[46]

Petitioner and the United States argue that a less stringent federal rule justifies disregarding Bancec's separate juridical status. Their authority supports no such conclusion. The cases they cite stand for no more than the proposition that courts may disregard the separate entities of controlled corporations only when "they are made the implement for avoiding a clear legislative purpose." *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946).[47] Thus, in *Anderson v.*

46 Curiously, the United States relies on Fletcher for the proposition that a subsidiary can be liable for the acts of its parent on counterclaims. Brief of the United States at 5, n.5. Fletcher explicitly states the contrary and, citing *Kingston Dry Dock*, states: "[i]t is rarely, if ever," that the subsidiary can be liable for the principal. *Fletcher, supra*, § 43, text accompanying n.66. *FMC Finance Corp. v. Murphree*, 532 F.2d 413 (5th Cir. 1980), cited in *Fletcher, supra*, § 43, 1982 supp., is not to the contrary. There, defendants were able to assert as an affirmative defense that plaintiff's parent corporation allegedly made misrepresentations about the transaction in issue on which defendants relied to their detriment. Fletcher also makes clear that claims against owners "cannot be set off against a corporation . . . [unless] the corporation may be justly disregarded . . . ." *Id.*, § 37; § 41.3, text accompanying nn.41-46.

47 *See also, Chicago Milwaukee & St. Paul Railway Co.* v. *Minneapolis Civic and Commerce Assn.*, 247 U.S. 490 (1918); *Marshall & Ilsley Corp. v.*

Abbott, 321 U.S. 349, 362 (1944), this Court carved an exception to the general rule of limited liability where Congress had explicitly abrogated limited liability for the shareholders of national banks.[48] Here, the only relevant congressional policy favors adherence to principles of limited liability.

Several of the cases cited by petitioner and the United States involve bankruptcy proceedings.[49] The rulings in those cases depend on a finding that the parent corporation or dominant stockholder violated a fiduciary duty to the corporation and could not stand on an equal footing with other corporate creditors. None of those cases involved liability for the debts of the corporation, and none supports petitioner's argument.

As the status of United States government corporations depends upon the intent of Congress,[50] cases involving them are not relevant here.[51] However, to the extent the opinions of this Court in those cases are instructive here, they establish that the separate juridical status of United States government corporations, endowed by Congress with the capacity to sue and be sued, will not be disregarded in suits against those corporations. In *Keifer & Keifer v. Reconstruction Finance Corp.*, 306

Heiman, 652 F.2d 685, 701, n.27 (7th Cir. 1981); *Homan & Crimen, Inc. v. Harris*, 626 F.2d 1201, 1208 (5th Cir. 1980).

48 *Anderson* appears to be *sui generis* since this Court disregarded the corporate entity in the absence of a finding of total domination and control or intent to circumvent the command of Congress. *See* dissenting opinion of Justice Jackson, with whom three other Justices joined. 321 U.S. at 372, 373, n.2

49 *See Pepper v. Litton*, 308 U.S. 295 (1939); *Taylor v. Standard Gas and Electric*, 306 U.S. 307 (1939); *Consolidated Rock Company v. DuBois*, 312 U.S. 510 (1941).

50 *See Federal Housing Administration Region No. 4 v. Burr*, 309 U.S. 242 (1940); *Federal Land Bank of St. Louis v. Priddy*, 295 U.S. 229, 231 (1935).

51 Lord Wilberforce was surely correct in a case comparable to this in having "very great doubt" whether the doctrines developed for English Crown agents and corporations which are "very much an emanation of English constitutional law, can viably be transplanted into the constitutional climate of foreign states. . . ." *Rolimpex*, [1979] A. C. 351.

U.S. 381 (1939), this court stated: "the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work." *Id.* at 388. *See also, Sloan Shipyards Corp. v. U.S. Shipping Board Emergency Fleet Corp.*, 258 U.S. 549, 567 (1922).

Petitioner and the United States rely on a different and inapposite line of cases involving government corporations, none of which presented an issue of liability. In those cases, this Court held that Congress intended certain government corporations to be a part of the government only for purposes of particular statutory schemes. *Rainwater v. United States*, 356 U.S. 590 (1958) (Commodity Credit Corp. part of government for purposes of False Claims Act); *Cherry Cotton Mills v. United States*, 327 U.S. 536 (1946) (Reconstruction Finance Corp. part of government for purposes of certain provisions in the Court of Claims Act); *Emergency Fleet Corporation v. Western Union Telegraph Co.*, 275 U.S. 415 (1928) (Fleet corporation part of government for purposes of obtaining favorable rates from Western Union). The irrelevance of those cases is demonstrated by the fact that, in suits against the same corporations, this Court will not pierce their corporate veils to extend the immunity of the United States.[52] The question is simply one of the intent of Congress.

C. The Republic of Cuba Is Not The "Real Party In Interest" Here.

The assertion that this Court should permit the counterclaim's assertion here because the Republic of Cuba is the "real party in interest" fails as an independent argument. Only when the corporation may justly be disregarded under the relevant corporate veil doctrine can such a counterclaim or setoff be permitted. Fletcher, *supra*, at § 37.[53] It is thus

52 The Regional Agricultural Credit Corporation, held a separate entity in *Keifer & Keifer*, was also covered by the False Claims Act and its telegams entitled to preferential rates. *Keifer & Keifer v. Reconstruction Finance Corp.*, 97 F.2d 812, 814 (8th Cir. 1938).

53 *See also, Jewish National Workers Alliance of America* v. *Merchants Bank of New York*, 238 App. Div. 395, 264 N.Y.S. 654 (1st Dept.

improper to permit a counterclaim against Bancec based on acts of the Republic of Cuba even if the State ultimately would benefit in some sense from a recovery by its subsidiary Bancec or the successor state corporation, Cubazucar. "[M]erely because one may benefit by the results in litigation does not make him a 'real party in interest'." *Armour Pharmaceutical Co.* v. *Home Insurance Co.*, 60 F.R.D. 592, 594 (E.D. Ill. 1973).

Rule 17(a), upon which the government relies, only underscores that Bancec is not liable for the government's debts under a "real party in interest" theory. For purposes of Rule 17(a), the "real party in interest is the party who, by substantive law, possesses the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery." *United States v. 936.71 Acres of Land State of Fla.*, 418 F.2d 551, 556 (5th Cir. 1969).[54]

Bangor Punta Operations v. Bangor & A.R. Co., 417 U.S. 703 (1974), does not counsel a contrary result. That case, which involved no issue of corporate liability, depended exclusively "upon the applicability of the settled principle of equity that a shareholder may not complain of facts or corporate management if he acquired his shares from those who participated or acquiesced in the alleged wrongful transactions." This Court, recognizing that "a corporation and its shareholders are deemed separate entities for most purposes," held that

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1933); *Hollingsworth v. Georgia Fruit Growers, Inc.*, 185 Ga. 873, 196 S.E. 766 (1938); *Security Savings & Trust Co. v. Portland Flour Mills Co.*, 261 P. 432 (S. Ct. Or. 1927); *Potts v. First City Bank*, 7 Cal. App. 3d 341, 86 Cal. Rptr. 552 (C.A. 2d Dist. 1970); *Cefalu v. N. Cefalu Co.*, 253 So. 2d 547 (La. App. 1971); *Oregon State Hwy. Commission v. Brassfield*, 363 P.2d 1075 (S.Ct. Or. 1961); *Jewett v. Martinsville Milling Co.*, 76 F.2d 153 (7th Cir. 1935). Even if a court takes jurisdiction over a counterclaim asserted against a stockholder, the defendant cannot prevail on the counterclaim unless the corporate plaintiff's veil can be pierced under traditional doctrine. *Establissement Tomis* v. *Shearson Hayden Stone*, 459 F. Supp. 1355 (S.D.N.Y. 1978).

54 *See also, Richards v. Reed*, 611 F.2d 545, 546 (5th Cir. 1980); 3A *Moore's Federal Practice*, ¶ 17.07 at 17-56; 6 Wright & Miller, *Federal Practice & Procedure*, § 1543 at 643 (1971). The substantive law to be applied is determined by reference to the forum's choice of law rules. 6 *Wright & Miller, supra*, § 1544 at 648-49.

"overriding public policy" forbids avoidance of the rule by suing the seller in the purchased corporation's name. *Id.* at 712. Unlike *Bangor Punta,* this action was not brought in Bancec's name because the Republic of Cuba is precluded from suing. Bancec sued because the substantive right belongs to Bancec and not to the government. There is no "overriding" public policy which dictates that Bancec's claim be held to be that of the Republic. *Bangor Punta* turned on principles of equity affecting the respective rights of present and former shareholders and not the rights of third party creditors against the corporation.[55]

V

ARGUMENTS BASED ON THE DISSOLUTION OF BANCEC AND DEVOLUTION OF THE CLAIM ARE NOT PROPERLY BEFORE THE COURT AND WITHOUT MERIT

Until the court of appeals rejected it, petitioner placed exclusive reliance on its *alter ego* argument. Petitioner now argues in addition that the counterclaim may be asserted under general rules of assignment law based on the "devolution" of the claim to the letter of credit proceeds.

The district court's denial of respondent's pre-trial motion to substitute Cubazucar as the successor to plaintiff excluded the issue of Bancec's dissolution and the subsequent history of the claim from this case. Judge Bryan concluded, in his discretion, that these issues should not be permitted to "multiply complications in this already complicated case." (J.A. 160). Accordingly, the action was tried without reference to those events and issues.[56]

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55 *Bangor Punta* is a "narrow case" limited to its facts. *National Union Elec. Corp. v. Matsushita Elec.,* 498 F. Supp. 991, 1006 (E.D. Pa. 1980). In *Standard Lime & Cement Co. v. United States,* 503 F. Supp. 938, 941 (W.D. Mich. 1980), also mistakenly relied on by the United States, the court refused to "pierce the corporate veil," deciding only to treat a parent and its subsidiary as one for venue purposes.

56 See the opening statements of counsel (J.A. 177-79); the examination of respondent's expert witness on Cuban law (J.A. 195-200); the

Not until after trial did petitioner offer into evidence a July 6, 1961 stipulation for *leave* to file an amended complaint substituting the Republic of Cuba as plaintiff. The trial judge, noting that the amended complaint was never filed, observed that plaintiff's counsel had, since 1961, "consistently" asserted that the representations therein were based on his own mistaken interpretation of Cuban law. Judge Bryan, admitting it into evidence only "because I am taking everything but the kitchen stove . . .," made clear that he was "concerned with what the legal position of the bank [Bancec] is, not what somebody once said about it . . ." J.A. 206-209. The district court deciding the case also gave the stipulation no weight. (J.A. 310).[57]

Even in retrospect, it is not clear whether petitioner introduced the stipulation to support its *alter ego* theory or a "devolution" argument (J.A. 206-209). In any event, petitioner manifestly abandoned any thought of asserting the latter, as its post-trial request for findings of fact and conclusions of law failed to address that theory, as did its post-trial memoranda. Accordingly, there was no reason at all for respondent to ask that the trial be reopened for purposes of recalling its Cuban expert or for it to brief the issue.

In Judge Brieant's decision three years later, the court did discuss the "devolution" of the claim on the basis of its own reading of the laws filed as part of the unsuccessful pre-trial

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post-trial request for findings of fact and conclusions of law and the post-trial memoranda. Petitioner only referred to the dissolution of Bancec to support its argument that the State dominated and controlled Bancec and its property. Thus, petitioner only sought a finding that Bancec's "assets were transferred to and its liabilities assumed by the Cuban government *or* one *or* more divisions, departments, agencies *or* instrumentalities thereof." (Deft's Proposed Findings of Fact and Conclusions of Law at p. 2, ¶ 1) (emphasis added).

57 Petitioner conceded respondent was not bound by the terms of the stipulation (J.A. 208) and properly so. "[I]f an agreement was made under a clear mistake, the claimants ought to be relieved from it, where it could be done without injury to the opposite party." *The Hiram*, 14 U.S. (1 Wheat.) 440, 448 (1816). Further, the trial court's decision to relieve a party of a stipulation entered into under a mistake of law is within its discretion. *Marshall v. Emersons Ltd.*, 593 F.2d 565, 568 (4th Cir. 1979).

motion to substitute Cubazucar, but its decision is apparently not based on that discussion. In any event, the district court gave no notice to respondent of an intent to disregard the prior order of Judge Bryan excluding the devolution issue from trial or to rely on those laws. While Rule 44.1 does not impose upon the court a notice requirement "of undesirable rigidity," the Rule does contemplate that "in general the court should give the parties an opportunity to analyze and counter new points upon which it proposes to rely," and that there is a requirement of "fairness to the parties." Fed. R.Civ. P. 44.1, Advisory Committee Note.[58] In the circumstances shown, depriving respondent of the opportunity to introduce evidence and expert testimony and present argument clearly would have been an abuse of discretion and a denial of fundamental fairness. If the Court nonetheless thinks that the issue is properly in the case, then it should remand for further proceedings.

If the merits are reached, the Court should reject petitioner's "devolution" argument for several reasons. The claims here were not subject to the provisions of Law No. 930 (J.A. 103-04) transferring claims and assets "peculiar to the banking business" to Banco Nacional. Bancec had both banking and trading functions and the reference to assets "peculiar to the banking business" must be understood in that context. The claim here arose from Bancec's trading business and at issue are the proceeds from the sale of sugar. The fact that the transaction was financed through a letter of credit no more makes Bancec a banker in this transaction than any other beneficiary of a letter of credit.

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58 See also *Walton v. Arabian American Oil Company*, 233 F.2d 541, 545 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956); *Harrison v. United Fruit Company*, 143 F. Supp. 598 (S.D.N.Y. 1956); *Berg v. Oriental Consolidated Mining Co.*, 70 N.Y.S. 2d 19 (Sup. Ct., N.Y. Co. 1947); Uniform Interstate & International Procedure Act, art. 4.01 (1980) (the model for Rule 44.1); *Schlesinger, A Recurrent Problem in Transnational Litigation: The Failure to Invoke or Prove the Applicable Foreign Law*, 59 Cornell L. Rev. 1, 20-26 (1973); *Federal Rule 44.1 and Foreign Law*, 65 Mich.L.Rev. 613, 662 (1967); Stern, Foreign Law in the Courts: Judicial Notice and Proof, 45 Cal.L.Rev. 23, 43-44 (1957); Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 Harv. L. Rev. 1281, 1286 (1952).

While no transfer was made by Law No. 930 of Bancec's trading assets, the Minister of Foreign Trade was directed to issue resolutions to ensure that Bancec's trade functions would be assumed by trade enterprises ("*empresas*") and that Bancec's assets would be liquidated and its capital distributed in such a manner as to allocate a sum for the capital of those enterprises (J.A. 104). By a companion law of the same date, Law No. 934 (Pet. 17d-24d), those *empresas* were designated successors in right, title and interest to the rights and obligations of Bancec which had not previously been vested in Banco Nacional (J.A. 134-35; Pet. 24d, ¶ 4).

On March 1, 1961, five days later, the mandates of Law Nos. 930 and 934 were carried out. The Ministry of Foreign Trade issued Resolution No. 1, creating a foreign trade enterprise. The *empresa* assumed the export trade functions that had formerly been carried out by Bancec and was subrogated to the rights and obligations which Bancec held as a result of its export activities. (J.A. 135, Pet. 26d, ¶ 2).[59] Thus, the rights involved here never passed to or vested in the Ministry of Foreign Trade (*i.e.*, the Republic of Cuba). On the contrary, the laws were explicit in providing for a direct transfer of those rights from Bancec to the foreign trade enterprise.

If the Ministry of Foreign Trade played any role at all in this statutory scheme, it was only in the capacity of a trustee, as it was entrusted and legally bound to transfer Bancec's assets to the new *empresa*. *See Ballard* v. *Burgett*, 40 N.Y. 314 (1869). *Restatement (Second) of Trusts*, § 284, 404 (1959). Had it recovered the proceeds or any other assets, it would have been obligated to turn them over to their legal owner, the successor *empresa*. The Republic having acted as a trustee, there could be no counterclaim based upon its acts in an individual capacity. *See Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 885 (2d Cir. 1981), and the district court's

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59 The United States is wrong in its assertion that, when petitioner raised its counterclaim on March 6, 1961, Bancec's claim belonged to the Republic of Cuba. (Brief of United States at 26, n.19). Assuming *arguendo* that Bancec's claim was ever owned by the Republic, it was transferred to the successor *empresa* before March 6, 1961, when petitioner's answer, raising the counterclaim, was filed.

own decision in *Chase* (J.A. 290, 342-62) and the cases cited therein. *Accord*, Codigo Civil, art. 1196 (Cuba). *cf. Restatement (Second) of Trusts*, § 329 (1959).

Assuming that Bancec's assets were held for five days by the Republic in its individual capacity, the result is the same. This is so whether one looks to the conflicts rule that provides that the effect of an assignment is to be judged according to the law of the place where the assignment was made or whether one adopts the "grouping of contacts" approach. Under the law of Cuba, the assignee would not take subject to petitioner's counterclaim because a counterclaim, to be properly asserted against an assignee, must have been liquidated prior to the defendant's having received notice of the assignment. *Codigo Civil* arts. 1196 (4), 1198 (Cuba). *Cf. Codigo Civil*, art. 1197 (Cuba).

Petitioner would fare no better under New York law, which does not consider a plaintiff assignee answerable to counterclaims or equities which the defendant may hold against an intermediate assignee. *Thompson v. Harrison*, 1 Daly 302 (N.Y. Ct. Com. Pleas 1863). *See C.J.S. Setoff & Counterclaims* § 54(d) (1953).[60]

VI

THE COURT OF APPEALS REVERSED THE JUDGMENT OF THE DISTRICT COURT BECAUSE OF A DISAGREEMENT AS TO LAW, NOT FACT.

Petitioner argues that the court of appeals failed to observe the mandate of Federal Rules of Civil Procedure 52(a) that findings of fact not be set aside unless clearly erroneous. As shown in the Statement of the Case, *ante*, the court of appeals reversed because the district court had identified the wrong legal issue. It made this crystal clear:

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60 The policy behind this rule is applicable here. At no time during its dealings with Bancec could petitioner have relied upon any claim it had against the Republic of Cuba. Had Citibank ever had a claim against Bancec, which it did not, it could, of course, have asserted that claim if sued by Bancec's assignee.

> While we agree with the District Court's description of Bancec's functions and its status as a wholly-owned instrumentality of the Cuban government, we reject its conclusions (Pet. 8a).

The "conclusions" referred to are that Bancec's functions and status result in its liability. Applying a different rule of law to the same facts (Pet. 8a-13a), the court of appeals reached a different result.[61]

It may also be noted that the district court's conclusions were, and could only have been, based on Cuban statutes and the expert testimony confirming and explicating them. There is nothing else in the record.[62] A determination of foreign law is "a ruling on a question of law." Rule 44.1, Fed. R. Civ. P. Even if viewed as factual determinations the "findings . . . rest on an erroneous view of the law, [and] may be set aside on that basis." *Pullman-Standard* v. *Swint*, ____ U.S. ____, 102 S.Ct. 1781, 1789 (1982); *Inwood Laboratories* v. *Ives Laboratories*, ____ U.S. ____, 102 S.Ct. 2182, n.15 (1982).[63]

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61 In determining *alter ego* liability, "the fact that a trial court labels determinations as 'findings' does not make them so if they are in reality conclusions of law. In that case, they are subject to unrestricted review." *Poyner* v. *Lear Siegler, Inc.*, 542 F.2d 955, 959 (6th Cir. 1976). *See also, Schultz* v. *Wheaton Glass Co.*, 421 F.2d 259, 267 (3d Cir.), *cert. denied* 398 U.S. 905 (1974).

62 Petitioner's reference to "live testimony" is misleading. Pet. Br. at 13. Judge Brieant did not hear the testimony.

63 Petitioner's reliance, Pet. Br., pp. 13-14, on several circuit court decisions deferring to *alter ego* findings by the district courts is mistaken. In none of these cases did the appellate court sustain a finding of fact made on an erroneous view of the law.

Further, the conclusion of the district court, if factual at all, is a finding of "ultimate 'fact' [which] more clearly implies the application of standards of law." *Baumgartner* v. *United States*, 322 U.S. 665, 671 (1944); *United States* v. *General Motors*, 384 U.S. 127, 141-42 (1966).

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Dated: New York, New York
January 10, 1983

Respectfully submitted,

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APPENDIX

Survey of Government Corporations

The following survey is necessarily incomplete. Aside from limitations of space, the number and variety of government corporations defy systematic treatment within the confines of a legal brief. Almost every country has such institutions and many have established hundreds. Further, the variety of forms is "almost infinite," Friedmann, *Government Enterprise: A Comparative Analysis,* in *Government Enterprise: A Comparative Study* (Friedmann & Garner, eds. 1970) (hereafter cited as *Friedmann*); see also United Nations Dept. of Economic and Social Affairs, *Organization, Management and Supervision of Public Enterprises In Developing Countries* 65 (1974) (hereafter cited as *1974 U.N. Study*).

Developing Countries

Government corporations have emerged as a principal instrument of economic and political policy throughout the Third World, *1974 U.N. Study* at 2. The United Nations has given "high priority" to assisting Third World countries in this aspect of public administration. *Id.* at iii. Thirty-two nations[1] have formed an International Center For Public Enterprise in Developing Countries ("ICPE") "devoted to the cause of public enterprise."

The developing countries see the viability of government corporations in the context of a broad international struggle for a new international economic order, the outcome of which will, as the Director of ICPE recently stated, *Financing of Public Enterprises in Developing Countries* 9 (Fernandes, ed. 1981):

> depend largely on the extent and sincerity of international understanding of the needs of the developing world and

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1 Algeria, Bangladesh, Costa Rica, Cuba, Cyprus, Egypt, Ethiopia, Guinea, Guyana, India, Iraq, Jordan, Jamaica, Democratic Peoples Republic of Korea, Kuwait, Malta, Mexico, Morocco, Namibia, Pakistan, Panama, Peru, Somalia, Sri Lanka, Sudan, Syria, Tanzania, Tunisia, Venezuela, Yugoslavia, Zaire and Zambia.

> of cooperation and also on the will and strength of developing countries to solve their own problems and become masters of their own destiny. This in turn will strengthen their negotiating power in this struggle, which will be further enhanced by their solidarity in this endeavor.
>
> In the growth profiles and development strategies of the developing world, public enterprise has already emerged and continues to grow as a major instrument of social and economic change.

The *1974 U.N. Study* surveys twenty-five "developing" countries with "mixed" or "capitalist" economies. (A copy is being lodged with the Librarian of the Court). It offers "some typical examples" of the importance of public enterprises in these countries. In Argentina, three-quarters or more of the sectors of electricity, petroleum, coal, steel, railways, domestic air transport, maritime transport, gas and re-insurance are covered by public enterprises, and between one-fourth and one-half of the banking sector. In India the public enterprise system is diversified into nearly all areas of industrial activity, including steel, coal, heavy engineering, petroleum, fertilizers, cement, textiles, paper, bread and sugar. In Uruguay public enterprises account for about 12% of total manufacturing outputs. *1974 U.N. Study* at 8-9.

The *Study* catalogues the reasons for governments' establishing public corporations. Prominent are the government's desire to use the enterprises as "an instrument to facilitate general economic development in accordance with governmental policy;" to generate income ultimately available to the government in furthering its developmental or other policies; to increase industrial output; to promote exports; to decrease imports through encouragement or development of import substitution; and to achieve social goals such as employment, income distribution, and promotion of skills. *Id.* at 2-7, 55. Examples of the surplus-generating function are Somalia's tobacco and match monopolies, India's state trading corporation and the "nationalized, formerly foreign dominated companies in Latin American countries," all of which transfer their profits to the government. *Id.* at 12-13. The *Study* observes,

however, that the "dominant objectives of the public enterprise system in a developing country" to implement general economic and political strategies "may at times involve some sacrifice of certain purely economic criteria." *Id.* at 7.

Generally public corporations are wholly-owned by the State; are created by special law; are exempt from most statutes applicable to expenditure of public funds; and are ordinarily not subject to the budgetary and related procedures applicable to departmental agencies. Another principal characteristic is that "as a body corporate, it is a separate entity for legal purposes. . . ." *Id.* at 64.

The 1974 *Study* concludes that "while in the early years autonomy appeared to be a distinctive claim of a public corporation, the emphasis on that began to decline in the course of time. . . ." *Id.* at 65. Frequently, there is now "direct ministerial control" of the public corporation's budget, pricing policies, investment decisions and "of all major policies which have clear macro-implications, economic or social. . . ." *Id.* at 94. In several countries, "almost no matter could not be brought within the scope of the statutory provisions" for direction or control. Moreover, actual ministerial control is generally much more pervasive and detailed than appears on the face of the relevant statutes. A 1981 conference of fourteen nations similarly reported that there were in fact frequent government interventions on questions of management. *Financial Profitability and Losses in Public Enterprises, International Workshop*, June 1-5, 1981, ICPE-F.IV/IW-81/5 at 39.[2]

In many developing countries, the board of directors has official majorities and the official members operate as a "medium of government intervention." Frequently, a Minister is an important member of the chair. *1974 U.N. Study* at 128-41. Government presence on the board invariably amounts to effective government control. In the view of the United Nations' *Study* it is appropriate for the government's representatives to dominate, as they seek to protect the interests of

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2 The participants were Algeria, Bangladesh, Egypt, Indonesia, Jamaica, Mexico, Pakistan, The Phillipines, Somalia, Sri Lanka, Tanzania, Thailand, Tunisia and Yugoslavia.

the investor—the government—and to concern themselves with questions of policy, including coordination of the activities of the enterprise with the broader interests of the national economy. *1974 U.N. Study* at 129.

Most public corporations are financed by government funds. Fernandes, *supra,* at 18. In the view of the *1974 U.N. Study,* a profound compromise of functional autonomy results from corporate financing in the form of periodic Treasury appropriations as distinct from an initial contribution of capital. *Id.* at 100. This is the view of Professor Friedmann as well. *Friedmann,* at 319-21.

Requiring periodic submission of budgets for government approval is similarly compromising. The general tendency, nonetheless, is for at least the capital budget of the corporation to be submitted and, in some instances the entire budget, including detailed estimates. *1974 U.N. Study* at 104-6.

Typically, net profits minus reserves for future operations go to the state treasury. The practice varies as to whether the corporation's board or the relevant ministry determines the amount of reserves to be withheld. Where the former is the case, government representation on the board ensures in any event that the government gets what it wants. *Fernandes, supra,* at 74. A twelve-nation conference[3] held in 1981 under the joint auspices of the United Nations Division of Public Administration and Finance and ICPE concluded that effective development strategy required pooling the profits of a nation's government enterprises rather than treating the surpluses of each enterprise as being available only for its use. *Id.* at 23. Similarly, the Conference recognized a need to integrate the operations of public corporations into a single, co-ordinated national plan. *Id.* at 18-20.

State trading is a significant activity and is on the rise. As long ago as 1964, it accounted for 25-35% of total imports in Ceylon, 30-50% in Burma, 40-50% in India, and 30-50% in Pakistan; and for 70-80% of total exports in Burma, 60-70% in China (Taiwan) and about 45% in Indonesia. United Nations Economic Commission for Asia and the Far East, *State*

3 Those attending were Guatemala, India, Iran, Iraq, Jamaica, Malta, Malaysia, The Phillipines, Roumania, Somalia, Zambia and Yugoslavia.

Trading in Countries of the Asia and the Far East Region 2 (1964) (hereafter cited as the *1964 U.N. Rep.*). Prominent among its objectives are to raise revenues for the government's Treasury; to stabilize and secure better export and import prices; to encourage production of agricultural and industrial commodities by means of price and other incentives; to facilitate trade with centrally planned economies; to facilitate the implementation of trade agreements; to secure the advantages of bulk transactions; and to ensure adequate supplies at reasonable and stable prices to meet local demands. *Id.* at 1-2. In most countries, state trading is pursued for "a mixture of economic and political objectives," *id.* at 2, and the companies frequently are not run on a strictly profit or commercial basis. *Id.* at 4-5.

A symposium on state trading organizations ("STO's") was held in 1982 under the sponsorship of the United Nations Conference on Trade and Development, the International Trade Center, UNCTAD-GATT and ICPE, with the representatives of thirty-nine developing countries participating. Their *Report, International Symposium of State Trading Organizations of Developing Countries,* 29 March-2 April (ICPE 1982) (hereafter cited as *1982 Report*) expressly "recognized that STO's had been set up by the developing countries. . . to be positive instruments of national development" and that they are viewed "as major instruments of developmental strategy in all developing countries." *Id.* at 8. The *Report* also reiterates the catalogue of state trading objectives drawn by the *1964 U.N. Study.*

In many countries, the government corporation exports products it or other government corporations produce. In China (Taiwan), for example, the Taiwan Sugar Corporation itself owns 30% of the nation's sugar acreage and twenty-seven sugar mills and exports the sugar it grows and refines. *1964 U.N. Study* at 2-3, 16-17. In several cases, the exported commodities are produced by nationalized concerns, as in Burma and Indonesia. *Id.* at 11-13, 20-22.

A "high percentage of STO's have in fact monopolistic positions. . ." *1982 Report* at 10. Even in 1964, the trend towards monopolization was well advanced. The Taiwan Sugar

Company exercised a monopoly on the export of sugar; Indian and Indonesian STOs exercised monopolies over numerous commodities; and in Burma, the STO's held a monopoly over the critical export commodities of rice, tea, and rubber, amounting to eighty percent of total exports. Even in those situations where there is competition, the state corporation generally is exempt from duties and other charges applicable to the private sector; enjoys preferences for the issuance of import or export licences, quotas and the allocation of foreign exchange; has preferential credit facilities; and has special transport and communications facilities. *1964 U.N. Study* at 6. Often the state corporations act as well as agents for the government or other government corporations in trade; regulate private sector activities; and guarantee minimum prices for the domestic producers of exported commodities.

These sources may be usefully supplemented by a brief description of the legal instruments of several corporations. Each was established by special legislation or Executive decree; has its own legal personality and property; is not responsible for the debts of the state nor the state for its debts; and is wholly-owned by the government.

ARGENTINA: *Banco Industrial de la Republica Argentina* (Decreto-Ley 13,130 de 22 de Octubre de 1957, *reprinted in,* 1957 *Anales de Legislacion Argentina* 868). *Capitalized* by government contribution. *Other income sources:* empowered to borrow from the government. *Gov't. control*: board and chief officer appointed by Executive; is to adjust its actions to the fundamental directives of the government. *Function*: develop the country's economy by providing loans, credits and technical assistance as well as commercial banking functions.

BOLIVIA: *Banco Minero* (Decreto-Ley de 16 de Agosto de 1939, *reprinted in,* Araoz, *Nuevo Digesto de Legislacion Boliviana* 281 (Vol. 4, 1943). *Capitalized* by government contribution. *Other income sources:* periodic appropriations from government as necessary. *Profits:* net profits minus reserves deposited annually in government Treasury; amount of reserves withheld determined by government. *Taxes:* no taxes on profits. *Gov't. control:* Head of board appointed by govern-

ment to serve as its representative; Financial Director appointed to represent the National Treasury and the Central Bank. In addition, there are two representatives of the State mining corporation and one representative each of the Ministry of Mining, the Association of Mining Corporatives, the Association of Small Mines and the employees. Corporation is to act in furtherance of the general policies established by the government. *Functions:* In Bolivia, the state is the owner of all mineral reserves and exploits those resources through government corporations as well as through concessions. *Banco Minero* is the exclusive exporter of minerals. It buys and sells minerals both for its own account and as an intermediary between producers and foreign purchasers. It also serves commercial banking functions.

CHILE: *Corporacion De Fomento De La Produccion* (Ley 6334 de 29 de Aprile de 1939, Decreto-supremo No. 2800 de 10 de Enero de 1941). *Capitalized* by government contributions. *Other income sources*: periodic appropriations from government, borrowing and receipt of percentage of certain taxes. *Taxes*: exempt from all taxes. *Gov't. control*: Board is composed of government officials sitting *ex officio* or as representatives of ministries. Among the *ex officio* government officials are the Minister of Economic Affairs and the Undersecretaries of Finance, Trade and Industry, Transport, Mining, Public Works and Agriculture, the President of the Central Bank, the President of the Bank of the State, and Director of the Budget, and the Director of the Economic Department of the Ministry of Foreign Affairs. *Functions*: promotes exports, investment and development through loans, credits and technical assistance. It also owns the stock of numerous other companies operating in particular sectors of the economy.

ECUADOR: *Corporacion Estatal Petrolera Ecuatoriana* (Decreto No. 926, de 6 de Septiembre de 1974). *Capitalized* by government contributions. *Other income sources*: periodic appropriations from government; 50% of taxes on the transport of oil and gas products. *Profits*: net profits minus reserves periodically deposited in government Treasury; corporation determines the amount of reserves but only with the approval

of the Excutive. *Gov't. control*: Board composed of government officials sitting *ex officio*, including several Ministers. Corporation is to operate subject to the supervision of the Ministry of Natural Resources and Energy. *Functions*: lifts, refines and exports oil.

GHANA: *State Gold Mining Corporation* (Decree of February 17, 1978). *Capitalized* by government contributions; declared successor to assets and liabilities of predecessor government corporation. *Other income sources*: as necessary, loans from the government. *Profits*: net profits minus reserves periodically deposited in government Treasury; the government determines the amount of reserves. *Gov't. control*: Board appointed by the government. Corporation is to act consistent with the general policies established by the government and the government may give binding general directions to the corporation on matters of policy, the only limitation being that such directives must conform to the corporation's operation on sound commercial lines. *Functions*: The State is the owner of all subsoil minerals. The corporation mines, refines and exports gold and allied minerals.

GUATEMALA: *Banco Nacional de Desarrollo Agricola* (Decreto No. 99-70, *Diario Oficial* de 22 de Diciembre de 1970). *Capitalized* by government contribution and transfer of assets of other government corporations, to which it declared the successor. *Other income sources*: as necessary, appropriations from government. *Gov't. control*: Chair of the board is the Minister of Agriculture *ex officio* and other members are *ex officio* government officials. Is required to "adjust itself to the governing policy of agricultural development" established by Ministry of Agriculture. *Functions*: to discharge the "responsibility of the Government to develop the agricultural and financial activities in the country to the end of promoting the economic and social development of the country" through extension of credit and other banking services.

INDONESIA: *Perusahaan Negara Pertambangan Minjak Nasional* (PERMINA) (Government Regulation No. 198 of 1961). *Capitalized* by being made successor to assets and liabilities of prior government corporation. *Other income*

sources: if necessary, periodic appropriations from government. *Profits*: net profits minus reserves deposited annually in government Treasury; amount of reserves determined by the government. *Gov't. control*: Board appointed by the government; is to operate "under the competence of the Department of Basic Industry and Mining." *Function*: the corporation lifts, refines and exports oil and natural gas.

KENYA: *Land and Agricultural Bank of Kenya* (Land and Agricultural Bank Ordinance, Chapter 323, Vol. VII *Laws of Kenya* (1962)). *Capitalized* by government. *Other income sources*: appropriations from the government from time to time and borrowing. *Profits*: net profits minus reserves periodically deposited in the government Treasury; corporation determines the amount of reserves withheld. *Taxes*: exempt from certain type of taxes. *Gov't. control*: Board appointed by Minister, who is authorized to make rules for the more efficient carrying out of the purposes of the corporation. *Functions*: develop the economy of providing loans, credits and technical assistance, particularly to farmers.

URUGUAY: *Administracion Nacional de Combustibles, Alcohol y Portland* (Ley No. 8,764 de 15 de Octubre de 1931, *reprinted in,* 1931 *Registro Nacional de Leyes* 611). *Capitalized* by government contribution. *Taxes*: exempt. *Gov't. control*: Board appointed by government. *Functions*: The State owns all the mineral resources of the country, and the Authority is established to "exploit and administer the monopoly of alcohol and hydrocarbons, domestic or imported, to refine and sell oil and its products." It also fixes prices for private sector in these commodities.

VENEZUELA: *Petroleos de Venezuela, S.A.* (Decreto No. 1,123 de 30 de Agosto de 1975, *reprinted in*, 401 *Gaceta Legal* 21 (Ramirez & Garay, *eds.* 1975). *Capitalized* by government contributions. *Other income sources*: appropriations from government as required. *Gov't. control*: Board appointed by the government. *Functions*: the State owns all mineral resources and the corporation is given the monopoly to lift, refine and export the oil.

Socialist Countries

UNION OF SOVIET SOCIALIST REPUBLICS

The following description of the Soviet Union's foreign trade system is taken from Quigley, *The Soviet Foreign Trade Monopoly: Institutions and Laws* (1974).

All foreign trade is a monopoly of the State. The trade is organized under the direction of the Ministry of Foreign Trade and is carried out in operational terms by forty-nine "all-union export-import combines". For the most part, each combine is the exclusive dealer in particular products.

A trade combine can conclude contracts and other commercial transactions in its own name. The State is not liable for its debts and the combine is not liable for the debts incurred by other State-owned organizations or by the State itself.

A combine's financial assets are segregated from those of the State and from those of other State-owned organizations. Each combine is initially delegated capital, which it may use for any purpose constant with its charter and with the State plans for foreign trade.

According to *Quigley*, at 111:

> The combine's civil-legal status thus makes it appear fairly independent of the Soviet government. When we look into the combine's administrative-legal position, however, the picture is quite different. Administrative superiors create a combine, appoint its top executives, and plan and supervise all its commercial operations.
>
> The USSR Council of Ministers creates, merges, divides, and liquidates combines, on recommendation from the foreign trade minister. The foreign trade minister appoints and removes a combine's chairman, deputy chairman, and other collegium members. The fact that most ministry and combine executives are Communist Party members gives ministry officials added leverage over combine officials.
>
> Although the combine possesses property, it may use that property only within bounds set by its superiors. The Foreign Trade Arbitration Commission declared that a combine is 'an economic organization, a legal person and

> a body autonomous in business transactions. At the same time, pursuant to law, the Corporation [combine] is unconditionally subject to the directives of the Ministry which, in accordance with the Constitution of the U.S.S.R., has authority over foreign trade.' A combine does not, in fact, 'own' the property it holds; since all production assets in the USSR constitute social ownership, combines enjoy the more limited right of 'operative management.' This means that they may utilize their property 'within the limits established by law, in accordance with the goals of their activity, planning assignments, and the designation of the property.' The Foreign Trade Ministry establishes each combine's product categories, which are recited in the combine's charter and confirmed by the minister. And even with respect to these products, the combine can deal only within the confines of the export-import plan. Just as the ministry allots property to the combine, so it can take it away, and without compensation. And whatever profit the combine makes must be turned over to the state treasury. (citations omitted)

POLAND

The Polish state trading organizations are described in detail by the Court of Appeals in the *Rolimpex* case, *Czarnikow Ltd. v. Centrala Handlu Zagranicznego "Rolimpex,"* 2 Lloyd's List L.R. 201 (C.A. 1978), *aff'd,* [1978] 3 W. L.R. 274.

Advanced Industrial Countries

The most convenient survey is found in *Government Enterprise: A Comparative Study* (Friedmann & Garner, eds., 1970) (hereinafter cited as *Friedmann II*) and its predecessor volume, *The Public Corporation: A Comparative Symposium* (Friedmann, ed., 1954) (hereinafter cited as *Friedmann I*).

In his 1970 conclusion, *Friedmann II* at 303, Professor Friedmann notes two major motives for the establishment of public corporations in so many countries and in so many different fields. One is the practical need to intervene "in the interest of the general development of the country, in ventures which private capital is either not willing or not able to

launch." This motive has often been supplemented by defense and strategic considerations. In some countries there has been, as well, "political philosophy": "moderate socialist theory [has] used the public corporation as a compromise with the older ideas of socialism and the newer necessities of economic management." Professor Friedmann points in particular to the post-W.W. II nationalizations of coal, transport, electricity and gas in Britain and coal, electricity, gas and press enterprises in France. Even when socialist theory has not added impetus, however, the use of public corporations is widespread. *Id.* at 306.

The "variety of forms" of public enterprises is "almost infinite". *Id.* at 307:

> Separate legal personalities is an almost indispensable aspect of the public corporation. In order to operate with the necessary degree of independence it needs the attributes which go with legal personality. The great majority of public corporations are specifically and expressly equipped with such personality in all the countries under study. *Id.* at 314.

There are two main practices of financing the corporations: periodic appropriations from the national budget and the provision of permanent capital assets. Apart from the United States, the practice of permanent capitalization is fairly universal. *Friedmann II* at 320.

Profits "go to the State, either at the disposal of the competent Minister or automatically . . ." or, by law, "they must be ploughed back into the development of the corporation." *Id.* at 321.

The appropriate degree of Ministerial control is "elusive." *Id.* at 325. "There is not a single country represented in this volume which denies the right of Ministerial direction altogether. There is general agreement that there should be Ministerial control over policy but not day-to-day operations. *Id.* at 326. In France, there is an express requirement of Ministerial approval for "important decisions" and of the corporation's budgets. The British statutes regulating the nationalized industries provide a general Ministerial power to give "directions of

a general character as to the exercise and performance by that corporation of their functions in relation to matters appearing to the Ministry to affect the national interests." *Id.* In addition, there are certain specific powers of approval where a major outlay of capital for development is involved, with regard to certain appointments and other cases. *Id.* at 327-8. Professor Friedmann emphasizes that in actual practice ministered direction is far more extensive than the legal provisions suggest. *Id.* at 326.

"Overwhelmingly the administration is in the hands of a governing board appointed by the Ministry." *Id.* at 315. Some countries prefer to make the Minister or his or her representative a member of the Board. *Id.* at 325. This practice, however, was more common in the past. The most significant exception to the recent trend is Canada, where the practice of having a Ministerial representative on the board is fairly universal. *Id.* at 316.

United States Government Corporations

As of 1976 there were at least 21 wholly-owned government corporations, 31 USC § 841. In 1945, at the time of enactment of the Government Corporation Control Act, 31 U.S.C. § 841 *et seq.*, the number was approximately 41, *see* 1945 U.S. Code Cong. Service at 891. All were endowed with their own legal personality, with the capacity to sue and be sued and to hold and own property.

The board of directors of a large number of these corporations was appointed by the President, some with and some without the advice and consent of the Senate. Other boards were composed, in whole or in part, of government officials sitting *ex officio*. For example, the Reconstruction Finance Corporation initially had on its board as *ex officio* members the Secretary of the Treasury and the Governor of the Federal Reserve Board in addition to four persons appointed by the President with the advice and consent of the Senate. The Federal Surplus Commodities Corp. had on its board as *ex officio* members the Secretary of Agriculture, the Under Secretary of Agriculture and the Assistant Secretary of Agriculture. The board of the Commodity Credit Corporation was com-

posed of officials of the War Food Administration, including the War Food Administrator (who was chair) and the Director of Production, the Director of Distribution, the Director of Price, and the Chief of the Agricultural Adjustment Agency. Where *ex officio* government officials constituted less than the full board, the balance was appointed by the President or other government officials. Gen'l Accounting Office, *Reference Manual of Govt'l Corps.*, Doc. No. 80, 79th Cong., 1st Sess. 15-26, 131-37, 200-07, 307-13, 395-402, 462-65 (hereafter *Manual*).

Many of the government corporations created by the Reconstruction Finance Corporation had only a brief existence. The Rubber Reserve Co., the Metal Reserve Co., the Defense Supplies Corp. and the Defense Plant Corp. were all created in 1940 and all were dissolved in 1945. *Manual* at 32, 38, 169, 225. Upon dissolution, the functions, assets and liabilities of the war-time corporations were transferred to other government corporations or government departments. When the RFC went into liquidation in 1954 many of its functions, assets and liabilities were transferred to other government corporations and departments. Reorganization Plan No. 2 of 1954, 5 U.S.C. Appendix 327, 19 Fed. Reg. 3986, 68 Stat. 1280.

The Government Corporations Act of 1945, 31 U.S.C. §§ 841 *et seq.*, provides for each corporation's annual submission to Congress of a business type budget. 31 U.S.C. §§ 847, 848 (1945). After considering the submission, Congress may approve it by affirmative action or by failure to act at all, or may revise it as it sees fit. Congress may also limit the corporation's expenditures for operating and administrative expenses and may provide for repayment of capital funds and the payment of dividends. Congress also passes upon requests for appropriations or other forms of funding. 31 U.S.C. § 849.

Petitioner's Reply Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FIRST NATIONAL CITY BANK,

Petitioner,

—v.—

BANCO PARA EL COMERCIO EXTERIOR DE CUBA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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March 18, 1983

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PETITIONER'S REPLY BRIEF

1. *Respondent's position is novel and untenable.* This case involves the propriety under federal law of an offset against a protagonist who seeks relief in courts of the United States. Respondent's brief fails to address the essence of the case. Respondent's primary argument is that, when the party seeking relief is a foreign government corporation, the independence of its status and its liability to offsets or counterclaims should be conclusively determined by reference to foreign law. That, of course, is a departure from established principles of federal law and from the positions taken by both of the courts below. For the reasons that follow, respondent is incorrect in its

formulation of the issues before the Court and its assertion of principles of applicable law.[1]

2. *The counterclaim is properly asserted.* Beyond any serious question, the Republic of Cuba is the protagonist of the claim and counterclaim in this case. There is no doubt that Bancec was created and operated as an arm of the Cuban government, notwithstanding its designation as a separate juridical entity. There is no doubt that it ceased to be a juridical entity more than 20 years ago when the Cuban government dissolved it. There is no doubt that the Cuban government assumed direct dominion over its assets, including the claim in this case, that Bancec was not reconstituted as a juridical or functional entity, and that the functions previously assigned to Bancec were dispersed among a series of specialized governmental instrumentalities. There is no doubt that the Cuban government disregarded the independence of real as well as formal juridical entities.[2] It offends common sense to pretend that Bancec has posthumous vitality through a purported "presumption" of juridical independence or otherwise.

Arguments to the contrary by respondent are without merit, particularly in light of respondent's own conduct in this litigation. In July 1961, respondent represented to petitioner and to

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1 Indeed, respondent appears to misconstrue the very question presented for review. Rather than considering the propriety of a counterclaim in the circumstances of this case, respondent "surveys" numerous "government corporations commonly found throughout the world." Brief of Respondent ("Resp. Br.") i, 11. Respondent's excursion should not be viewed with favor. Sup. Ct. R. 34.1(a), 21.1(a); *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967); *Irvine v. California*, 347 U.S. 128, 129 (1954) ("We disapprove the practice of smuggling additional questions into a case after we grant certiorari."); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 177-79 (1938).

2 The property of private American enterprises, including Citibank, was taken by the Cuban government in reprisal for American governmental action.

the court that Cuba was the owner of the claim in this suit. Respondent's current contention that its representations were without significance because, *inter alia*, the trial judge accepted the representations in evidence without indicating their effect, conveniently ignores the trial court's admonition that the stipulation would, in fact, be reviewed "for what it is worth."[3] The dissolution of Bancec, the devolution of the claim, as well as the stipulation, are all relevant and material to a determination of whether, during its transient existence, Bancec was, as the district court found, the *alter ego* of the Cuban government for purposes of this litigation.

In like manner, respondent's elaborate argument as to the "similarity" of Bancec to "commonly found government corporations" is beside the point. Reiteration of the statutory powers or immunities enjoyed by Bancec under Cuban law sheds no light on the question whether it functioned as an integral part of the Cuban government. Nor does the "survey" of government corporations in selected countries at indetermi-

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3 Joint Appendix ("Jt. App.") 209. Respondent's statement that the stipulation was not offered in evidence until after trial (Resp. Br. 55) is inaccurate and its reference to Judge Bryan's statement that "I am taking everything but the kitchen stove" (Resp. Br. 55) is misleading or irrelevant, or both. It was wholly proper for the district court, acting without a jury, to accumulate all available information from which it sifted and weighed what was relevant and material to its factual determinations. Fed. R. Evid. 401, 402; Fed. R. Civ. P. 52(a). Equally unpersuasive is respondent's claim that it may properly ignore its own representations. Under the doctrine of judicial estoppel, and to insure the integrity of the judicial process, respondent should not be relieved of its own protestations. *Davis v. Wakelee*, 156 U.S. 680, 689 (1895); *Scarano v. Central Ry. Co.*, 203 F.2d 510, 513 (3d Cir. 1953). In addition, as discussed in Petitioner's Brief ("Pet. Br.") 8-9, Cuba's direct assumption and assertion of the claim in the name of Bancec permitted Citibank to "set up as a set-off or counterclaim a claim existing directly against the assignee, which defendant holds. . . ." 80 C.J.S. *Set-off and Counterclaim* § 54 at 105 n. 58 (1953), at § 54 at 14 n.58 (Supp. 1982), *citing, Segal Lock & Hardware Co. v. Markey*, 124 N.Y.S.2d 181 (Sup. Ct. 1953); *see also* 4 Corbin On Contracts § 896 at 595, 595-96 n.19 (1951).

nate times bolster respondent's position. Indeed, that survey, coupled with the dissolution of Bancec and reallocation of Bancec's functions to "separate," specialized entities, strongly supports the inference that Bancec was broken up precisely because it was the *alter ego* of the Cuban government.

Equally unpersuasive is respondent's characterization of petitioner's position as a "fraudulent scheme theory." Rather than address the particulars of petitioner's brief, respondent seems to dismiss it "as a matter of law" under the act of state doctrine and the Foreign Sovereign Immunities Act. The act of state doctrine does not prevent a court from inquiring into the identity of a plaintiff who enters the U.S. courts. *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972), *on remand*, 478 F.2d 191 (2d Cir. 1973). Nor does the Foreign Sovereign Immunities Act preclude such inquiry. *See* Pet. Br. 11-12.[4]

Further, respondent ignores the fundamental error of the court of appeals: its denial of the notion of permissive counterclaims. The panel decided that "since . . . the counterclaim for expropriation of the [Citibank] branches was not assertable against Bancec, we reverse on that ground," and that "since Bancec had no connection with the subject-matter of the Citibank counterclaims, we will not rule, for the purposes of the present litigation, that Bancec was an *alter ego* of the Cuban government." Appendix to Petition ("Pet. App.") 7a,

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4 Respondent's claim that the "intervention" of the sugar mill in this case did not truly constitute a "nationalization" of the sugar is also erroneous. "Intervention" and "nationalization" have repeatedly been held to be the same thing. *See F. Palicio y Compania, S.A. v. Brush*, 256 F. Supp. 481, 483-84, 487-88 (S.D.N.Y. 1966), *aff'd per curiam*, 375 F.2d 1011 (2d Cir.), *cert. denied*, 389 U.S. 830 (1967). *See also* Jt. App. 295-97 and other decisions cited in Pet. Br. 15 n.7. And, as to the particular sugar in this case, Cuba "nationalized the properties of corporations engaged in the business of manufacturing sugar and thus, according to its own allegations, became the owner of all sugar. . . ." *Banco Nacional de Cuba v. Sabbatino*, 27 F.R.D. 255, 258 (S.D.N.Y. 1961).

11a. These determinations by the court of appeals are nothing more nor less than a decision that the counterclaim is not assertable because it did not arise out of the same transaction or event upon which the claim asserted by respondent was based. That conclusion, we submit, forms a perfect circle of unreason; the counterclaim should not be dissallowed because the taking of Citibank's property was ordered by Minister of State Guevara as president of Banco Nacional rather than by Minister of State Guevara as president of Bancec. Such a result violates Fed. R. Civ. P. 13(b) and irreconcilably conflicts with decisions of this Court. *See* Pet. Br. 8-11.

3. *The findings of the trial court were based on a correct view of the controlling legal principles and were supported by ample evidence.* As noted in petitioner's main brief 13-19, the trial court's finding that "Bancec is an *alter ego* of the Cuban government" (Jt. App. 319) is supported by ample evidence and cannot fairly be characterized as clearly erroneous. That finding was based on a proper view of applicable law.

Respondent does no more than argue that alternative findings could have been supported, should have been made, and are the only way to avoid the calamities that it foresees. Resp. Br. 7-54. As an alternative, respondent argues that the district court's findings are flawed because they are based on an erroneous view of Cuban law. Resp. Br. 58-59. In light of this Court's decision in *Pullman-Standard v. Swint*, 102 S. Ct. 1781 (1982), and the record in this case, neither of these contentions is valid.

In *Pullman-Standard*, the Court reaffirmed the application of the clearly erroneous rule to findings of fact, however characterized by an appellate court. The Court explained that the clearly erroneous guideline of Fed. R. Civ. P. 52(a) does not divide a trial court's findings of fact into separate categories that deal with "ultimate" facts and "subsidiary" facts. 102 S. Ct. at 1789. As that case reaffirmed, a trial court's findings may be overturned only if they are clearly erroneous, or if they

are made under an erroneous view of controlling legal principles.

Here, the trial court's findings were based on ample evidence. Upon intimate familiarity with the evidence, the trial court found that, on the totality of the circumstances in the record before it, Bancec and the Revolutionary Government of Cuba were *alter egos* for purposes of this litigation. That finding deserved respect notwithstanding that the panel's reading of the record may have led it to draw a different inference. As the Court noted in *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 102 S. Ct. 2182, 2189 n.16 (1982), although more than one inference may be drawn from evidence presented, reversal of the trial court is warranted only when the inferences drawn by it are unreasonable. *See also Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960). The panel was not warranted in substituting its own view for that of the trial court unless the inference that the panel drew from the evidentiary facts was the only conclusion that could rationally be drawn.[5]

Under the Court's analysis in *Pullman-Standard*, and despite respondent's contrary assertion, the identity of a party is a question of fact. In *Pullman-Standard*, the trial court was required to determine the intent that motivated a program, as well as the effects of the program. This Court looked to the widely held view that intent was a question of fact, and so

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5 Indeed, a careful reading of the Second Circuit opinion reveals that, as in *Pullman-Standard*, the court of appeals in this case merely refound the facts. The Second Circuit, while attempting to "conclude," "rule," and "hold," Pet. App. 8a, 11a, 13a, specifically acknowledged that the district court found Bancec to be Cuba's *alter ego*. Pet. App. 7a. The Second Circuit looked to the " 'decisive' fact" of Bancec's "role," the "circumstances with respect to Bancec," and Bancec's lack of "connection with the Citibank counterclaims." Pet. App. 10a, 11a. The Second Circuit even "agree[d] with the district court's descriptions of Bancec's functions and status. . . ." Pet. App. 8a. Thus, the Second Circuit's own characterizations reveal that what it did was not to reverse a legal error but to repudiate findings of fact that were not clearly erroneous.

concluded. 102 S. Ct. at 1789. The trial court in this case was charged with a substantially identical task. The trial court found that "under all of the relevant circumstances shown in this record" it is clear "that Bancec lacked an independent existence, and was a mere arm of the Cuban government, performing a purely governmental function." Jt. App. 316-17. Such questions of identity are widely held to be questions of fact. *See The S.S. Denny*, 40 F. Supp. 92, 94-95 (D.N.J. 1941), *rev'd on other grounds*, 127 F.2d 404 (3d Cir. 1942) (status of legal entity as government instrumentality is a question of fact). *See also Kunstammlungen zu Weimar v. Elicofon*, 358 F. Supp. 747 (E.D.N.Y. 1970), *aff'd*, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974). Indeed, virtually all of the circuits agree that such questions of identity or *alter ego* are not rulings of law but are findings of fact.[6] This factual determination of the trial court here, whether or not preferred by the court of appeals, was not clearly erroneous.[7]

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6 Second Circuit: *United States v. Rosenstein*, 474 F.2d 705, 708, 713 n.5 (2d Cir. 1973); *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170, 171 (2d Cir. 1961); Fourth Circuit: *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 687 (4th Cir. 1976); Fifth Circuit: *James Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451, 459 (5th Cir.), *cert. denied*, 404 U.S. 940 (1971); Seventh Circuit: *Leach Co. v. General Sani-Can Manufacturing Corp.*, 393 F.2d 183 (7th Cir. 1968); Eighth Circuit: *National Bond Finance Co. v. General Motors Corp.*, 341 F.2d 1022, 1023 (8th Cir. 1965); Ninth Circuit: *Plumbers & Fitters, Local 761 v. Matt J. Zaich Construction Co.*, 418 F.2d 1054, 1058 (9th Cir. 1969); Tenth Circuit: *In re Eufaula Enterprises, Inc.*, 565 F.2d 1157, 1160-61 (10th Cir. 1977). The only purportedly contrary authority provided by respondent, *Poyner v. Lear Siegler, Inc.*, 542 F.2d 955 (6th Cir. 1976), *cert. denied*, 430 U.S. 969 (1977), contradicts without explanation or citation this bulk of authority and disregards earlier authority which suggests that an *alter ego* determination is one of fact. *The Kongo*, 155 F.2d 492, 495 (6th Cir.), *cert. denied*, 329 U.S. 735 (1946) (an individual "was found by the District Court to be the alter ego of the Barge Lines, and this finding is supported by substantial evidence.").

7 Respondent's claim that there is "nothing else" but Cuban statutes in the record, so the district court's factual findings had to be rulings

Nor was this case decided under an erroneous view of the law. The legal issue is whether Citibank's counterclaim is properly asserted.[8] The propriety of asserting the counterclaim is governed by federal law.[9] Under federal law, a defendant may reduce an amount claimed by asserting whatever counterclaims it has against the protagonist of the claim. Fed. R. Civ. P. 13(b). The panel of the court below confounded both logic and law by holding that, because claim and counterclaim did not arise from the same occurrence, the true identity of the protagonist must be disregarded.[10] The finding of the district

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of law under Fed. R. Civ. P. 44.1, is inaccurate. Cuban statutes are not determinative. Moreover, several witnesses testified before the district court, notably respondent's witness, Raoul Lopez, whose testimony on direct and cross examination justified the view that Bancec was no more than a puppet of the Revolutionary Government of Cuba. Further, insofar as it considered Cuban statutes, the district court simply examined descriptive facts appearing in the statutes.

8 Contrary to respondent's assertion (Resp. Br. 58-59), the legal issue in this case is whether the counterclaim is barred because Bancec was not the instrumentality used by the Cuban government to confiscate Citibank's property. The determination that the Cuban government is the protagonist in this action is a preliminary, factual question.

9 The ineffectiveness of Cuban law to confer immunity on respondent in this case is discussed at pages 10-14 below.

10 There is no occasion for a remand to the district court. The court of appeals did not question the trial court's finding as to "Bancec's functions and its status as a wholly-owned instrumentality of the Cuban government." Pet. App. 8a. It dismissed Citibank's counterclaim because it believed that Cuba's employment of Banco Nacional rather than Bancec to seize Citibank's property precluded a finding that Bancec and the Cuban government were *alter egos* for purposes of the litigation. Pet. App. 11a. Although the court below did not reach the issue as to whether the trial court properly determined that the value of Citibank's eleven Cuban branches exceeded the amount of respondent's claim ($193,280), remand to the court of appeals for that purpose should not be required in this case. The court of appeals in *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875 (2d Cir. 1981) left undisturbed the net asset valuation of the lower court, on which the valuation in this case was based. Thus, the valuation determination below remains intact.

court was neither clearly erroneous nor based on an erroneous view of the law, and its decision should have been left undisturbed.

4. *The district court correctly decided this case on the facts and the law consistently with the interests of the United States and international law.* When, as here, a foreign plaintiff invokes the jurisdiction of a United States court, it assumes the burden of showing that American law entitles it to the relief it seeks.[11] International law, itself a part of United States law, *The Paquete Habana*, 175 U.S. 677, 700 (1900), dictates no different result.

As the briefs submitted by the United States as *amicus curiae* state, the decision of the court below, unless corrected, will adversely affect the conduct of foreign policy, the national interest in protecting overseas commerce and investment, and the maintenance of legal standards and procedures for that purpose.[12] In the words of the United States,

> The decision of the court of appeals severely limits the ability of American claimants to raise valid expropriation claims in proceedings instituted against them in the United States by foreign government instrumentalities. The denial of a right of setoff to American claimants therefore impairs the interests of the United States in the protection of our citizens and their commercial dealings abroad.

U.S. Br. 2. These expressions, we submit, outweigh respondent's contentions to the contrary.

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11 The validity of a claim or defense may, in a proper case, be affected by foreign law but federal law determines the circumstances in which and the extent to which relief will be granted. In this case, neither the validity of the claim nor that of the counterclaim is an open issue. The question is whether there is a sufficient identity between the party prosecuting the claim and the party against whom the counterclaim is asserted to justify curtailment of recovery on the claim.

12 The United States' briefs endorse petitioner's view of what law is applicable and of its correct application.

In response to that declaration, respondent presents its own version of what United States policy should be. It argues that, when a foreign government corporation claims access to a court of the United States, the national interest of the United States requires the court to defer to the law of the foreign sovereign, not only as to the identity of the plaintiff but also as to the defenses available to the defendant. This proposes a radical and unsound departure from existing federal law that cannot be justified on policy grounds or otherwise.

The policy of the United States, as clearly stated in its *amicus* briefs, is that a government corporation which seeks access to a court ordinarily enjoys no special treatment. A court will and should adjudicate the controversy in accordance with the laws which that court is competent to administer. United States courts are not, and should not be, deterred from applying a rule of law because of the prospect that the same rule will be applied or even abused in foreign courts. The most that a foreign government corporation, suing in a court of the United States, can expect is equal treatment, just as a United States corporation can expect no more in a foreign court.

Respondent's contention that subservience to foreign law is required by federal or international conflict of laws principles is also contradicted by the authorities, including those to which respondent refers. In *Kunstammlungen zu Weimar v. Elicofon*, 358 F. Supp. 747 (E.D.N.Y. 1970), *aff'd*, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974), defendant resisted a claim by the plaintiff (for brevity referred to as Weimar) on the ground that the protagonist was in fact the German Democratic Republic (GDR), which was itself disabled from suit as a foreign government not recognized by the United States. Weimar asserted that under German law it was a juridical entity independent of the government. After an evidentiary hearing, the court found that Weimar was an integral part of the GDR government and concluded that Weimar was barred from suit. 358 F. Supp. at 756. The Second Circuit unanimously affirmed. 478 F.2d at 232. Neither the district court nor

the court of appeals restricted its inquiry to Weimar's arguments on foreign law. Rather, the courts conducted their own inquiries on the purported independence of the government instrumentality.

Similarly, in *Banco Nacional de Cuba v. First National City Bank*, 270 F. Supp. 1004 (S.D.N.Y. 1967), although Cuban law declared the purported autonomy of a government instrumentality (in that case, Banco Nacional), Cuban law did not and could not end judicial inquiry. Rather, the district court examined the structure and function of Banco Nacional and concluded that Banco Nacional was, for purposes of that litigation, one and the same with the Cuban government. 270 F. Supp. at 1006 n.3. The Second Circuit, again notwithstanding Cuban law, agreed. 478 F.2d 191, 193, 194 (2d Cir. 1973). Thus, both courts recognized that Cuban law did not preclude their determination that Banco Nacional was, for purposes of that litigation, liable on Citibank's counterclaim.

And, in this case, the district court and court of appeals reached their conclusions, not on the basis of Cuban law, but under United States federal law. The district court reviewed the various Cuban laws regarding Bancec's status and functions, but did not view them as controlling. Similarly, the court of appeals, albeit reaching a different result, looked not to Cuban law, but to its own prior decision in *Banco Nacional*, a United States statute (the Foreign Sovereign Immunities Act), and other federal authorities. *See also Dade Drydock Corp. v. The M/T Mar Caribe*, 199 F. Supp. 871 (S.D. Tex. 1961).

Congress also has declared that the courts of the United States shall determine the liability of an instrumentality of a foreign government notwithstanding foreign law. In like manner, whether a claim or other property is owned by a foreign government instrumentality, or by the foreign government or another of its instrumentalities, is a question to be determined by the United States courts notwithstanding foreign law. Pet. Br. 8-12; U.S. Br. 11-15.

The English decisions, to which respondent refers, similarly contradict its assertion as to the effect of Cuban law. In none of those cases was the English court deterred from application of English law to the controversy before it. In *Trendtex Trading Corporation v. Central Bank of Nigeria*, [1977] 2 W.L.R. 356, each of the justices explicitly declined to be bound by the foreign state's law respecting the immunities of its juridical entities. The court found this adjudicatory exercise appropriate under international law as well as under the laws of England. Lord Denning remarked, "It cannot be right that international law should grant or refuse absolute immunity according to the immunities granted internally." 2 W.L.R. at 370. Lord Stephenson explained, "[I]t is the conception of a government department according to English law which that body must satisfy in an English court." 2 W.L.R. at 375. And, Lord Shaw said, "The view of the government concerned must be taken into account but is not of itself decisive; it does not relieve a court before which the issue of sovereign immunity arises of the responsibility of examining all the relevant circumstances." 2 W.L.R. at 383 (citation omitted).

In *C. Czarnikow Ltd. v. Centrala Handlu Zagranicznego Rolimpex*, [1978] 3 W.L.R. 274, a Polish state entity, Rolimpex, was sued in the courts of England for breach of contract to deliver beet sugar. Rolimpex asserted a defense of *force majeure*, alleging that it was prevented from performing its contract by reason of the acts of the Polish government. The fact-finders, agreeing with Rolimpex, determined that Rolimpex, on the particular facts of that case, was a legal entity sufficiently separate from the Polish government to be able to rely on governmental acts as *force majeure*. The House of Lords upheld the defense but only after a careful review of English law. 2 W.L.R. at 278-79.

In *I Congreso del Partido*, [1978] 1 Q.B. 500, the court was called upon to decide whether in 1973 the Cuban government and certain of its instrumentalities were entitled to immunity. It made that determination upon a review of the complex facts

and in accordance with English law. Although the trial court found as a fact that in 1973 there was a disjunction between the specific instrumentalities and the Cuban government such that under English law the instrumentalities were neither entitled to sovereign immunity nor liable for acts of their parent government, the court decided all aspects of the controversy before it in accordance with English law, notwithstanding that Cuban law might have suggested a different result. It is significant, too, that the English court regarded its treatment as conformable to international law.[13]

In short, federal, international and foreign law contemplate that immunity based on foreign law does not exclude imposition of liability on a foreign party that has sought an adjudication under the law of its chosen forum. In simplest terms, when respondent voluntarily entered a court of the United States, it was required to leave outside its shields as well as swords of foreign artifice.[14] By invoking the jurisdiction of the court to adjudicate its claim against Citibank, respondent put in issue all aspects of its entitlement to the relief it requested.

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13 Of course, the factual determinations of the English court as to the status of Cuban instrumentalities are neither dispositive nor persuasive in this case. There, the court reviewed the facts as to certain Cuban instrumentalities as of 1973, whereas here the court determined the functions and status of another instrumentality, Bancec, prior to its dissolution in 1961. What is significant is that the English court made a factual inquiry both as to the function and status of the instrumentalities and as to the role played by the Cuban government, not under Cuban law, but under English law.

14 In this case, we emphasize again that respondent's claim is for recovery of property in the United States, namely, a debt payable by and allegedly due and owing from a United States national in the United States. The devolution of the claim is therefore significant because the validity of Cuba's purported transfer of property in the United States is governed by federal law. *Republic of Iraq v. First National City Bank*, 353 F.2d 47, 50 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966). Cuban law is not controlling either to compel recovery or to cut off defenses that would curtail the recovery.

The court was thus required to ascertain the identity of the protagonist. The obligation and duty of the court to ascertain identity on the basis of principles of federal law is recognized by federal decisional law, by international law, and, to the extent applicable to this case, by the Foreign Sovereign Immunities Act. No foreign statute or decree can grant immunity from the application in the United States of federal law. *See* U.S. Br. 11-15 and authorities cited therein. To hold otherwise would permit foreign governments to frustrate United States policies by using our courts at will through creation of "juridical entities" whenever they found it expedient to do so. *See Kunstammlungen zu Weimar v. Elicofon*, 358 F. Supp. at 757; Brief for United States as Amicus Curiae on Petition for Writ of Certiorari 7-8.

In its arguments for a contrary result, respondent departs from the decision of the court of appeals. That court decided, erroneously we believe, that federal law precluded Citibank from assertion of a counterclaim that would curtail respondent's recovery because, as it said, Bancec did not play a key role in the acts giving rise to the counterclaim. The decision of the court below does not hold that Citibank's counterclaim is precluded by reason of Cuban law or of some undefined prohibition of international law.

Moreover, references to the status under international or municipal law of state trading companies in selected countries, or of present-generation Cuban entities, are inappropriate to an appraisal of the way the judicial task in this case was performed. The duty of the district court was to ascertain the relationship of Bancec and the Cuban government in 1960, when the present controversy arose, and the relationship of the Cuban government to the claim asserted in this case, in order to determine whether claim and counterclaim are opposed in accordance with federal law. That duty was properly discharged in all respects.

Conclusion. The judgment of the court of appeals should be reversed and the judgment of the district court reinstated.

Dated: New York, New York
March 18, 1983

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No. 81-984

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FIRST NATIONAL CITY BANK,

Petitioner,

—v.—

BANCO PARA EL COMERCIO EXTERIOR DE CUBA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE INTERNATIONAL CENTER FOR LAW IN DEVELOPMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-984

FIRST NATIONAL CITY BANK,

Petitioner,

—v.—

BANCO PARA EL COMERCIO EXTERIOR DE CUBA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE INTERNATIONAL CENTER FOR LAW IN DEVELOPMENT

INTEREST OF AMICUS

This brief is filed in support of the position of the respondent by the International Center for Law in Development.[1]

The International Center for Law in Development (hereinafter ICLD) is a nongovernmental, nonprofit organization

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1 The written consents of the parties to the filing of this brief *amicus curiae* are on file with the Clerk of this Court.

established to undertake and promote the comparative and international study of legal aspects of shared problems of development concerning third world countries. As a successor institution to the International Legal Center, ICLD works in collaboration with institutions, scholars and officials in different parts of the world to organize seminars and working groups which generate research and publications aimed at developing a more systematic knowledge of the role of law in the processes of social change and development and explore the policy implications thereof. Its Board of Trustees consists of eminent scholars, diplomats and legal practitioners, a majority of whom come from third world countries.

Most ICLD programs are envisaged as being "joint ventures" between the core ICLD working group and a variety of third world-oriented institutions, scholars and lawyers in different parts of the world working with ICLD in a variety of ways: as organizers of working groups, researchers and editors of various research reports. ICLD works in close relationship with both the Asian and Latin American Councils on Law and Development. These Councils are nongovernmental regional associations of persons interested in promoting interdisciplinary studies of law in development. The list of ICLD collaborators includes other international organizations such as the United Nations Asian Centre for Development Administration; and the Food and Agricultural Organization/Latin America; regional research institutes such as the Scandinavian Institute of African Studies; and national research institutions such as the University of the Philippines Law Center.[2]

Through a program of publication ICLD seeks to encourage studies of laws and legal systems in developing countries which go beyond descriptions of institutions or normative analyses of legal doctrines and which emphasize the need to understand social and economic forces affecting legal development.

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2 The ICLD has no relations to the parties to this action or the governments of the United States or Cuba.

The ICLD has long been interested in the law and practices of public enterprises, particularly in view of their dominant role in the economic life of developing nations. Towards this end, it has sponsored conferences, funded research and published monographs. Its major publications in this area are: *Law and Public Enterprise in Asia* (Praeger, 1976); *Public Enterprises and Development in the Arab Countries* (ICLD, 1978); *Law in the Political Economy of Public Enterprises* (ICLD and the Scandinavian Institute of African Studies, 1977); *The Accountability of Public Enterprise* (ICLD, 1980); and *Legal Choices for State Enterprises in the Third World* (1976).

The ICLD's interest in public enterprises stems also from its concern with the economic relationship between developing and industrialized countries, and their significance in international economic transactions. In two series of research and training workshops on the new international economic order in Asia during the last four years, the ICLD has examined the various legal aspects of public enterprises in international economic transactions.

The ICLD considers that the issues raised by the present case have implications which go beyond these proceedings. They affect the manner in which the production and trading activities of most national economies are organized. The decision of this Court could have a particularly significant effect on third world countries, a considerable part of whose external trade is conducted by state enterprises. Consequently, the ICLD wishes to place before this Court its views on some of the issues raised by the litigation.[3]

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3 The ICLD wishes to note that the substantive portions of this brief were prepared by Yash P. Ghai, Professor of Law at the University of Warwick Law School, and a member of the ICLD Board of Trustees.

SUMMARY OF ARGUMENT

State enterprises have emerged as one of the few effective instruments of economic promotion available to developing countries. The state enterprise can function effectively in a commercial environment only if legally distinct from the government that owns it. Accordingly, legislation throughout the third world establishes state enterprises in the corporate form, giving them some measure of fiscal autonomy and a separate juridical identity with the capacity to sue and be sued.

Courts throughout the world have recognized the separate entities of state enterprises, looking to the legislation establishing them to determine their status. Whether and to what extent a state controls its enterprise has been held irrelevant to the determination of its corporate separateness, and correctly so.

Recognition of the separate juridical status of state enterprises is important to the stability of international trade and investment and crucial to the continuing vitality of the state enterprise in developing countries.

ARGUMENT

I

THE ROLE OF STATE ENTERPRISE IN THE ECONOMIES OF THIRD WORLD COUNTRIES.

The role of state enterprises in third world countries is similar in many respects to their role in the more developed, market economies, especially in Western Europe.[4] Neverthe-

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4 For discussions of the role of public enterprises in developed market economies, see Friedmann & Garner, eds., *Government Enterprise: A Comparative Study* (1970); Friedman, ed., *Public and Private Enterprise in Mixed Economies* (1974); Coombes, *State Enterprise: Business or Politics?* (1971); de Bouhoff, *The State, Capital and Economic Policy* (1978); Bavanol, *Public and Private Enterprise in a Mixed Economy* (1980); Vernon and Aharoni, eds., *State-Owned Enterprise*

less, there are also some qualitative and quantitative differences. The public sector in the developing countries is more extensive than in a developed market economy. Its dominance is marked by the relative weakness of the private sector. State enterprises have emerged as one of very few potentially effective instruments of economic policy and promotion available to the governments in developing countries.[5]

Third world countries have attempted to pursue a number of different goals through state enterprises. They are used both by developing socialist (*e.g.*, Cuba, Tanzania, Vietnam), as well as capitalist countries (*e.g.*, Kenya, Indonesia, Malaysia, Brazil, Argentina, etc.). In both instances state enterprises are used to make up the deficiencies of the market mechanism. Commodity boards are established to facilitate the sale and marketing of agricultural products; state finance and loan institutions are set up in the absence of adequate private capital markets. In both capitalist and socialist countries, state enterprises are set up to enhance national control over the domestic economy, and for this purpose it is common to lodge the major natural resources

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in the Western Economies (1981); Vernon ed., *Big Business and the State* (1974); Shepherd, ed., *Public Enterprise: Economic Analysis of Theory and Practice* (1976).

5 For the growing literature on public enterprises in the third world, see in particular Ghai (ed.), *Law in the Political Economy of Public Enterprises: African Perspectives* (1977); Hanson, *Public Enterprise and Economic Development* (1965); United Nations, *Organization, Arrangement and Supervision of Public Enterprises in Developing Countries*, 1974; Lang-Jones, Patankar & Boodhoo, *Politics, Public Enterprise and the Industrial Development Agency* (1974); International Legal Center, *Law & Public Enterprise in Asia* (1976); *Public Enterprises and Development in the Arab Countries* (1978); Sobhan & Ahmed, *Public Enterprise in an Intermediate Region: A Study in the Poltical Economy of Bangladesh* (1980); Khera, *Government in Business* (1977); Sydeydy, *Role and Performance of Public Enterprises in the Economic Growth of Pakistan* (1977); Jones, *Public Enterprise and Economic Development: The Korean Case* (Seoul, 1975); Pozen, *Legal Choices for State Enterprises in the Third World* (1976); Ramanadham, *Problems of Public Enterprises* (1959).

in a state corporation or company. State enterprises also establish and maintain the physical and economic infrastructure—railways, harbours, electricity, water supply.

In many instances, state enterprises are set up because no private entrepreneur is forthcoming to provide the particular service. State enterprises in manufacturing and marketing sectors are established for want of national businessmen with the necessary skills, experience, capital and initiative. The choice for the government is either to invite foreign corporations to establish these industries or to set up state enterprise supported by the aggregation of state resources and charged with the responsibility for the development of industries. Occasionally, a state enterprise is set up to provide a framework for foreign investment, in circumstances when a joint venture is preferred to full foreign investment. Governments hope to transfer technology and skills to local personnel through state enterprises, and to negotiate better arrangements with external bodies. Governments expect to use state enterprises for the generation of revenue, and to provide funds for further investments.

In some instances, public enterprises are set up at the behest of foreign donor agencies, who prefer to make loans for disbursements to entities distinct from the government, both to avoid the red tape of bureaucracy and perceived corruption of governments, as well as to make their own control and supervision of the funds easier. Governments also set up public enterprise to mediate between their own national economies and the international economy, to cope better with the fluctuations of international trade, and persistent and chronic shortages of foreign exchange.

There are many similarities in laws, organizations and franchises of state enterprises throughout the third world, although in some capitalist countries, they may be seen as transitional institutions to make way for the private sector, where they have a more dominant and permanent role in socialist economies. Their importance is increasing everywhere; they are frequently

the largest employer, responsible for the greatest proportion of capital formation, crucial in the exploitation of natural resources, and pivotal in foreign trade.

II

THE ORGANIZATION OF STATE ENTERPRISES

There are three basic organizational forms for state enterprises.[6] The first, and the oldest, is the government department, in which the enterprise has no distinct entity of its own, being submerged in the government and subject to the rules which apply to it. This form has come under increasing criticism in the last three or four decades on the grounds that the commercial and industrial enterprises share unfairly in the immunities of the state, to the disadvantage of their creditors and competitors alike. Moreover, their own initiative and ability to organize their activities in a businesslike manner is seriously inhibited by the regulations which govern internal relations within the government, particularly the lack of financial autonomy and the freedom to hire and fire.

As a result, many departmental enterprises are converted into one or the other of two forms, the public corporation or the government company,[7] and new enterprises are almost always established as corporations or companies. These latter two forms share the characteristic that they are legally distinct from the government and vested with their own legal personality. Their powers and functions are defined by law in the case of public corporations, and by the memorandum and articles

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6 For a more elaborate discussion, *see* United Nations, *Organization, Management and Supervision of Public Enterprises in Developing Countries*, *supra*.

7 *See* Elias for this development in Nigeria, in *Friedmann* 1974, *supra*; a similar pattern was found in East Africa. This trend is also noticeable in the United Kingdom as is demonstrated by the conversion of the post office into a corporation in 1969.

of association in the case of companies, and are thus subject to the rule of *ultra vires*. They have their own finances and property, which they are free to deal with, subject to certain statutory limits and conditions. They have the usual attributes of corporate bodies—the right to hold property, enter into transactions on their own account, to sue and to be sued.[8] Such enterprises enjoy considerable freedom in the recruitment of their staff, who are not civil servants.[9]

Quite apart from considerations of red tape, slow and complex decision-making processes, etc., it was clear that, as the public sector grew, the departmental form would become increasingly unsuitable. State enterprises came to be involved in more and more transactions. Increasing numbers of people and organizations came in contact with them—as suppliers, consumers and competitors. State enterprises entered into transactions with each other; they became responsible for large sums of money; and assumed more and more specialized functions. It was therefore necessary to strip them of their state immunities in order to make them more accountable in law, to separate off their assets and finances in order to increase their accountability and to facilitate control and audit of their activities. Financial and economic discipline was scarcely possible so long as they remained part of a department or ministry. They needed to operate in a commercial environment. The increasing specialization of their functions required freedom, within guidelines, to conduct their own operations.

The format of the corporation or company was therefore adopted to free the enterprise from restrictions on finance, decision-making, etc. that obtain in the public service. The corporate form gives them greater control over assets vested in

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8 See U.N. Study, *supra*, n.5.

9 The Indian Supreme Court has held that the employees of public corporations are not public servants, *Sukhdev Singh v. Bhagatram*, 1975 A.I.R. 131. *See* Jain, *The Legal Status of Public Corporations and their Employees*, in 18 J. Indian L. Inst. 1 (1976). Similar conclusions have been reached in most jurisdictions.

them and greater autonomy in the conduct of their activities; it emphasizes their commercial and business character, keeps their accounts and finances separate from the government and limits the application of state immunities.

In short, the separate legal personality of each enterprise is fundamental to the operation of an economic system in which a key role is assigned to the public sector. This is amply recognized in the legislative and legal instruments establishing the enterprise. To claim that the distinction between the government and the enterprise is irrelevant is to violate the intention of the legislation. Very great chaos would result if the accounts, transactions and properties of the enterprises were not treated distinctly and separately.

III

JUDICIAL DETERMINATION OF THE STATUS OF STATE ENTERPRISES

The Courts have generally followed the legislative policy and intention and held that state enterprises are distinct from the government. In the important case of *Taulin v. Hannaford*, [1950] 1 K.B. 18, the Court of Appeal in England had to determine whether the British Transport Commission was entitled to be treated as an agent of the Crown. Denning, L.J., delivering the judgment of Court, answered the question in the negative, despite its public purposes and the powers of the minister in relation to the Commission. The Court was influenced by the incorporation of the Commission and the vesting in it of its own legal personality. He went on to say that in the absence of a specific provision to the contrary, the proper inference, at least in that case, is that a commercial corporation acts on its own behalf, even though it is controlled by a government department.[10]

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10 *Id.* at 25. *See also, International Railway Co. v. Parks Commission* [1941] A.C. 328, where the Privy Council held the Commission, because of it incorporation, a legal entity separate from the Crown.

Numerous Indian decisions have also held that the corporation is a separate entity from the government, so that the government's total ownership of the equity of a company does not render it the agent of the government, *Heavy Engineering Masdoor Union v. State of Bihan*, 1970 A.I.R. 82, and that it employees are not public servants. *See, supra*, p. 7, note 6. The Supreme Court of New Zealand has held that a statutory corporation is distinct from the government, and set much store in the fact that under the relevant legislation, the corporation was given the power to "sue and be sued." *Smith & Smith Ltd. v. State Advances Corp.*, [1939] N.Z.L.R. 588.

Foreign courts respect the classification adopted by the law of the country of the enterprise. Two recent English decisions of the House of Lords are of special interest as the enterprises concerned are similar to respondent. In *Czarnikow v. Centrala Handlu Zagranicznego Rolimpex*, [1979] A.C. 351, the Lords had to determine whether the defendant, a wholly-owned and controlled state enterprise of the Polish Government, could plead as a defense to a charge of breach of contract for the delivery of sugar, *force majeure*, arising from the decision of the Government to ban the export of that commodity. The plaintiffs argued that since the enterprise (Rolimpex) was so identified with the Polish State, it could not rely upon the Polish Government's act as *force majeure*. The House of Lords refused to equate Rolimpex with the Polish State and preclude it from raising *force majeure*.

The other case is *Playa Larga and I Congreso del Partido*, [1981] 1 W.L.R. 328, where the House of Lords had to consider the status of Cuban state enterprises, including Cubazucar. Lord Wilberforce regarded them as separate from the government, although subject to the direction and control by the government, which provided all the funds necessary for their operation:

> It has never been claimed that either of these are agents of, or that they contracted on behalf of the Cuban State. State controlled enterprises, with legal personality, ability

> to contract and to enter into contracts of private law, though wholly subject to the control of their state, are well-known features of the modern commercial scene. The distinction between them, and their governing state, may appear artificial; but it is an accepted distinction in the law of England and other states.

Id. at 332.

IV

CONTROL BY THE GOVERNMENT OVER STATE ENTERPRISES

There are numerous judicial authorities from Britain and the British Commonwealth that have upheld the distinct entity of an enterprise despite the presence of one or more factors advanced by the petitioner. In *Smith & Smith Ltd. v. Savitt, State Advances Corporation*, [1939] N.Z.L.R. 588, the New Zealand Supreme Court held that the Corporation is not the *alter ego* of the Crown, although its funds came from the government and were goverened by the Public Revenues Act, 1926. In *Wanganasi Borough v. Wanganasi Education Board*, [1923] N.Z.L.R. 524, the Education Board was held not to be an instrument of the Crown although the Board's lands were in "the fullest sense the property of the Crown."

The presence or absence of financial autonomy or self-financing is not a conclusive test. The Tennessee Valley Authority, contrary to the contention of the petitioner in their Petition to this Court dated 25 November 1981, is entirely dependent for its finances on Congressional appropriations "in much the same way as the ordinary activities of the government are financed—that is, by coming to Congress annually, offering estimates of needs and then . . . being awarded what Congress believes to be adequate." Finer, *The T.V.A.: Lessons for International Application*, 181. British public corporations' finances are now fully provided by or controlled by the government; yet it would be absurd to suggest that they were

merely agents of the government, and, among the consequences, render the government liable for all their debts. The Indian Supreme Court has held that the fact that the entire capital of a government company is contributed by the government which also owns all its equity does not by itself constitute the company as agent of the government.[11] Indeed it is usual for most government corporations to be funded entirely out of public funds, and to have their loans, when not obtained from the government, at least guaranteed by it.

The test of functions is equally inconclusive, as is clear from authorities on state immunity from different jurisdictions. There is no clear or final list of what can be termed state functions. As Douglas, J. said in *New York v. United States* (*Saratoga Springs Case*), 326 U.S. 572, 591 (1946):

> A State's project is as much a legitimate governmental activity whether it is tradtional, or akin to private enterprise, or conducted for profit . . . . What might have been inferred in an earlier day as an improvident or then dangerous extension of state activities may today be deemed indispensable.

The functional test allows scope for the imposition of the prejudices of the court, and may in particular result in the imposition of a specific economic ideology by the court on a foreign state. As the then Chief Justice of Australia, Latham, C.J., said in the *Uniform Tax Case,* (1942) 65 C.L.R. 373, 423:

> There is no universal or even general opinion as to what are the essential functions, capacities, powers or activities of the State. Some would limit them to the administration of justice and policy and necessary associated activities. There are those who object to State action in relation to health, education, and the development of natural re-

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11 *Heavy Engineering Mazdoor Union v. State of Bihan*, 1975 A.I.R. 82. See also to similar effect, *Dat Pethe v. District Collector,*, 1976 A.I.R. 37. *See also, I Congreso del Partido* [1981] 1 W.L.R. 328, per Lord Wilberforce at 332.

> sources. On the other hand, many would regard the provision of social services as an essential function of government . . . . It is not for a court to impose upon any parliament any political doctrine as to what are and are not functions of government, or to attempt the impossible task of distinguishing, within functions of government, between essential and nonessential or between normal or abnormal. There is no sure basis for such a distinction.

The validity of Latham's warning is borne out by the District Court's characterization of the functions of the respondent as "purely governmental". The respondent was primarily involved in the financing and the actual conduct of foreign trade, *i.e.*, it was concerned to buy and sell commodities, to secure the best prices it could for its exports, diversify foreign markets, and increase domestic production. As part of its operation, it was expected to advance loans to organizations engaged in production for export, purchase all kinds of products in foreign markets and sell them in the country directly or throught its own agencies, create affiliated companies abroad, and participate in the captial of other concerns engaged in export-import trade. Cuban Law No. 793 of April 25, 1960. It is thus clear that not only are the functions of respondent largely commercial but its operating methods were to be so likewise.

On the question of control, there are decisions that suggest or hold that enterprises remain distinct from the government though fully state controlled. *Playa Larga and I Congreso del Partido*, [1981] 1 W.L.R. 328; *Smith & Smith Ltd.* v. *State Advances Corp.* [1939] N.Z.L.R. 588; *Taulin v. Hannaford* [1950] 1 K.B. 18. The Indian Supreme Court has held that in the absence of a statutory provision, a commercial corporation acting on its own behalf even though it is controlled wholly or partially by a government department, will be ordinarily presumed not to be a servant or agent of the State. The fact that a minister appoints the members or directors of a corporation and he is entitled to call for information, give binding direc-

tions and supervise the conduct of the business of the corporation does not render the corporation an agent of the Government. *Heavy Engineering Mazdoor Union v. State of Bihan*, 1970 A.I.R. at 86. In an appeal from Australia, the Judicial Committee of the Privy Council held that governmental control of a statutory corporation did not make it an agent of the government. *Metropolitan Meat Industry Board v. Sheady*, [1927] A.C. 899.

Even if the degree of control was relevant to the question of *alter ego*, there are particular difficulties in determing it. Is the degree of control to be gathered from the express provisions of the law? *Cf Bank voor Handel en Scheepvaart N.V. v. Administration of Hungarian Property*, [1954] A.C. 584. Or is to to be gathered from the actual reality of the situation? If the former, what if the government does not seek to exercise the control that is legally open to it, leaving the enterprise with a wide discretion in practice? What if the law does not permit forms of control that are in fact exercised by the government? What if the law does permit control and the government attempts to exercise it but the enterprise manages to evade it? The governmental machinery of many third world countries is too weak and inexperienced to exert control over complex business and commercial enterprises whose managers operate with better knowledge and skills than the politicians or bureaucrats who seek to control them. It is thus the case that in many instances, although the governments have armed themselves with a most impressive armory of legal controls, they have little influence on corporate policy. *See, e.g.*, Ghai, *supra.*, Pozen, *supra.* Indeed, one reason for the steady accumulation of control devices is the inability of governments to control state enterprises.

A further difficulty, particularly in developing countries, in using the "control" test is that in many instances the government's power over the private sector is quite extensive as well.[12]

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12 *See, e.g.*, Meyrdze, *Operational Controls Over the Private Sector* in *Asian Drama* (Vol. II (1968)); Menan and Mysore, *The Law Relating*

Thus, there are or have been in numerous countries controls on investments that may be made, on prices that my be charged for a corporation's products, on the dividends it may issue, and on the contracts that it may enter into with foreign organizations. The government may be able to influence the policy and activities of a private corporation by its allocation of foreign exchange and other scarce resources. Governments have wide, discretionary powers to punish or reward private corporations, and it is now unusual for a significant private investment to be made in a third world country without the investors entering into complex negotiations with the government to ensure that the discretionary powers are exercised in its favour, *e.g.*, as regards rebates of custom duties on imports, machinery, remission of profits, tax holidays, etc. In these negotiations, the Government in turn seeks the adherence of the investor to its policies and programs. In many instances, there may not be much difference in the degree of control by the government over the public and the private sector. In these circumstances, the centrality of control as determinative of the agency question is vitiated.

V

FUNDAMENTAL CONSIDERATIONS

There are several reasons why national and international development require treating public enterprises separately from the government:

1. It restricts the scope of the application of sovereign immunity;

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to Governmental Control Over Private Enterprise (1970); Ghai, *supra* at 242-243; Adoniji, *Governmental Regulation of Business in Nigeria: A Case Study of Regulatory Administration in a Mixed Economy,* XII Quarterly J. Ad. (1978); Kimble, *Price Control in Tanzania* (1970); Preston, *Market Control in Developing Economies,* 4 J. Develop. Stud. 481-86 (1968); Killick, *Development Economies in Action* (1978).

2. It maintains stability in international trade and investment;

3. A decision disregarding the legal separation of public enterprises and their governments, and particularly one established by this Court, would serve as precedent for disregarding the separate legal status of foreign corporations and subsidiaries. In particular, the countries of the developing world would be provoked to questioning the separate legal status of United States corporations and their subsidiaries. This chain-reaction would be extremely disruptive of international trade and relations;

4. A burden would be placed on international relations, as the developing countries see the formation of the separate enterprises as a matter of their sovereignty and they place a great deal of their national hopes on these enterprises;

5. Numerous United States corporations have made agreements with public enterprises in the third world. Their assumption is that these enterprises have separate personality and do not share in the immunities and privileges (substantive and procedural) of the governments. The legal rights of these United States corporations would be considerably weakened if the enterprises were to be treated as agents/*alter egos* of the government;

6. If the United States courts were to accept the principle urged by the petitioner, it would make the United States a less attractive place for overseas countries to trade with; and the United States banks not particularly secure institutions to deal with;

7. The principle urged by the petitioner would be grossly unfair to the creditors of the enterprise which is penalized for the acts of its government, as the assets of the corporation might be extinguished and the creditor may not have any recourse against the government itself;

8. What are the limits of the petitioner's principle? If the claim against the government can be set up as a setoff against an enterprise, why should not a claim against one enterprise be set off against another enterprise of the same government? All these inroads would make nonsense of the concept of corporate personality;

9. Insofar as the enterprise is to be treated as an agent of the government on the basis of control, it will throw a difficult burden on the courts. The evidence is not easy to find, and is hard to evaluate. Governments have taken an increasing control over the private sector, and are able to make many directions to private corporations.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Amicus Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FIRST NATIONAL CITY BANK,

Petitioner,

—v.—

BANCO PARA EL COMERCIO EXTERIOR DE CUBA,

Respondent.

BRIEF OF KALAMAZOO SPICE EXTRACTION COMPANY *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF KALAMAZOO SPICE EXTRACTION COMPANY AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

This brief is submitted with the consent of all parties. Written consents from all parties are on file with the Clerk of this Court.

The Kalamazoo Spice Extraction Company ("Kalamazoo Spice"), a Michigan corporation, is currently involved in litigation in the Western District of Michigan arising out of the uncompensated expropriation of its investment in Ethiopia. This brief is intended to inform the Court that the decision below is not only erroneous on its particular facts, but also contains the potential for encouraging unjust results in other cases involving expropriation related counterclaims.

Kalamazoo Spice manufactures and sells spice oleoresins, concentrated spice essences in an oily base. From 1967 through 1975, Kalamazoo Spice did business in Ethiopia through an 80% owned Ethiopian subsidiary, the Ethiopian Spice Extraction

Share Company ("ESESCO"). In 1975, the Provisional Military Government of Socialist Ethiopia ("PMGSE"), as part of a general program of nationalization, expropriated Kalamazoo Spice's investment by seizing control of ESESCO and declaring itself the owner of a majority of ESESCO's shares. These actions deprived Kalamazoo Spice of all benefit and control of its investment without any compensation. All efforts to negotiate a reasonable settlement have failed.

Kalamazoo Spice continued to take delivery of oleoresins ordered from ESESCO before the expropriation, ultimately receiving almost two million dollars worth of oleoresin before ESESCO ceased shipment. In 1978, ESESCO sued Kalamazoo Spice in an

attempt to collect on the accounts receivable. */ Kalamazoo Spice counterclaimed, inter alia, for damages resulting from the uncompensated expropriation of its investment and alleged that ESESCO is the alter ego of the PMGSE. ESESCO denies liability on the ground of its separate juridical status.

The Kalamazoo Spice case thus presents the alter ego question in the context of a foreign state continuing to operate expropriated American property as part of an ongoing commercial enterprise. Kalamazoo Spice's counterclaim against its former

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*/ See Ethiopian Spice Extraction Share Co. v. Kalamazoo Spice Extraction Co., et al., 543 F. Supp. 1224 (W.D. Mich. 1982) (order finding certain facts to be established without substantial controversy pursuant to Fed. R. Civ. P. 56(d)) ("Kalamazoo Spice").

subsidiary demonstrates the potential injustice in attaching excessive legal significance to the existence of a separate juridical entity. Determining whether an agency or instrumentality of a foreign state may properly be the subject of a counterclaim based on an expropriation carried out by the foreign state necessarily entails the exercise of a court's equitable powers to reach the substance of a transaction despite its form.

Kalamazoo Spice's interest in the outcome of this case is increased by the fact that self-help and the federal courts are its only alternatives for recovering compensation from the PMGSE. Negotiations with the PMGSE have been fruitless. The United States has suspended assistance to Ethiopia under the

Hickenlooper Amendment, 22 U.S.C. § 2370(e)(1), but it is in no position to achieve a settlement. This Court must be aware that endorsement of the decision below may imperil the only method by which many American companies can attempt to gain redress after uncompensated expropriations.

SUMMARY OF ARGUMENT

This case requires the Court to consider criteria for determining when an agency or instrumentality of a foreign state is the alter ego of that state for purposes of a counterclaim based on an expropriation by the foreign state. Kalamazoo Spice believes that such alter ego treatment is appropriate for every agency or instrumentality that is defined as a "foreign state" under Section 1603 of the Foreign Sovereign

Immunities Act of 1976, 28 U.S.C. §§ 1602-11 (1976) ("FSIA"). Alternatively, Kalamazoo Spice urges this Court to hold that an agency or instrumentality of a foreign state which sues an American national in a United States court is amenable to a counterclaim based on an expropriation carried out by the foreign state where the interests of justice are served.

In the view of Kalamazoo Spice, such a result is in the interest of justice in the following cases, inter alia:

(1) where the agency or instrumentality is a corporation or other entity which was the object of the expropriation;

(2) where the agency or instrumentality was involved in the expropriation or in the administration of the expropriated business or property in any significant way;

(3) where the agency or instrumentality performed a governmental function related to a general program of nationalization;

(4) where the agency or instrumentality would be deemed the alter ego of the foreign state under traditional criteria for piercing the corporate veil; or

(5) where the claim asserted by the agency or instrumentality is related to the expropriated business or property.

ARGUMENT

I. RELIANCE ON THE SEPARATE JURIDICAL STATUS OF AN AGENCY OR INSTRUMENTALITY WILL PRODUCE UNJUST RESULTS IN MANY DIFFERENT SITUATIONS

The Second Circuit held, in effect, that a counterclaim based on an expropriation by a foreign state cannot be asserted against an agency or instrumentality of that state if that agency or instrumentality is "a separate and distinct juridical entity under the laws of the state that owns it" unless the agency has a "key role" in the expropriation which is the subject of the counterclaim. Banco Para el Comercio Exterior de Cuba v. First National City Bank, 658 F.2d 913, 918 (2d Cir. 1981). As the Solicitor General pointed out in the brief of the United States supporting the petition in this case, the Court

of Appeals formulation provides a foreign state that confiscates American rights with a road map which it can follow to avail itself of the justice of American courts without submitting its own confiscatory actions against the American defendant to the justice of those same courts:

> [G]overnments contemplating expropriation may protect themselves from liability in American courts by ensuring that their instrumentalities with assets or claims in the United States do not play a "key role" in the expropriation.

Brief of the United States as Amicus Curiae in Support of the Petition for Certiorari at 8.

The facts in the instant case represent only one of numerous strategies that a foreign state could employ to evade

a counterclaim if United States courts defer to the corporate forms utilized by the expropriating state. Extension of the Second Circuit's approach to the facts in the Kalamazoo Spice case would simplify matters even further for a foreign state. If United States courts refuse to treat an expropriated company as the alter ego of a foreign state because the company did not play a "key role" in its own expropriation, a foreign state will be free to pursue claims directly related to the expropriated business without submitting to the justice of American courts by the simple expedient of bringing an action in the name of the expropriated company.

Admittedly, this absurd result could be avoided, even within the terms of

the Second Circuit's decision in this case, by recognizing that a corporation owned by a foreign state can play a "key role" in an expropriation as the object, as well as the instrument, of the expropriation. However, the Kalamazoo Spice situation illustrates the basic fallacy of relying on separate juridical identity as a criterion to determine the liability of a state agency for an expropriation carried out by the state that controls it. Application of this traditional corporate law concept in the expropriation context can produce unjust results.

Rigid adherence to the corporate form has already been properly rejected in the context of judicial refusal to enforce foreign expropriation decrees in this country. United States courts have

traditionally refused to enforce expropriation decrees past the boundary of the expropriating state, and they have "pierced the corporate veil" when necessary to prevent the seizure of ownership interests located in a foreign state from resulting in the confiscation of corporate assets in the United States. */ Inflexible reliance on separate

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*/ See, e.g., United Bank v. Cosmic International, Inc., 542 F.2d 868 (2d Cir. 1976) (Bangledesh expropriation of shares and assets of jute mill could not reach accounts payable for jute shipped to the United States prior to the taking); Maltina v. Cawy Bottling Co., 462 F.2d 1021 (5th Cir. 1972), cert. denied, 409 U.S. 1060 (1972) (expropriation and dissolution of Cuban corporation held not to impair the rights of former shareholders to control the trademarks of that corporation in the United States); Zwack v. Kraus Bros. & Co., 237 F.2d 255 (2d Cir. 1956)

(Footnote continued)

corporate identity to determine amenability to counterclaim will allow a foreign state to do indirectly what it is not allowed to do directly, i.e., to invoke the jurisdiction of the United States courts without submitting to that jurisdiction. Such a result is contrary to basic principles of equity.

Deciding whether to "pierce the corporate veil" is traditionally considered an exercise of a court's equitable powers.

(Footnote continued)

(expropriation of Hungarian partnership held not to impair the rights of former partners to control trademarks of Hungarian partnership in the United States); Compania Ron Barcardi S.A. v. Bank of Nova Scotia, 193 F. Supp. 814 (S.D.N.Y. 1961) (former shareholders of expropriated Cuban corporation held authorized to consolidate assets of Cuban corporation located in United States).

See Riverdale Mills v. Alabama and Georgia Mfg. Co., 198 U.S. 188 (1905). Some twenty years before the passage of the FSIA, general equitable principles were used by this Court to deny a foreign state the benefit of a sovereign immunity defense in the face of a counterclaim. The "consideration of fair dealing" was held to preclude a foreign state from using American courts while simultaneously claiming immunity from counterclaims. National City Bank v. Republic of China, 348 U.S. 356, 365 (1955). The same "consideration of fair dealing" relied upon in Republic of China should guide this Court's determination of whether an agency or instrumentality of a foreign state can be allowed access to American courts without being held liable for expropriation related counterclaims.

II. AN AGENCY OR INSTRUMENTALITY OF A "FOREIGN STATE" AS DEFINED BY THE FSIA IS AMENABLE TO A COUNTERCLAIM BASED ON AN EXPROPRIATION BY THE FOREIGN STATE

Contrary to the view of the Court of Appeals, the structure of the FSIA expresses a clear congressional intent that an agency or instrumentality of a foreign state may be treated as the alter ego of the foreign state for purposes of expropriation claims, particularly expropriation-related counterclaims. Section 1603(a) of the FSIA specifically defines a "foreign state" as including an "agency or instrumentality" of the foreign state. In turn an "agency" is defined, inter alia, as any "separate legal person, corporate or otherwise ... a majority of whose shares, or other ownership interest, is owned by a foreign state." 28 U.S.C.

§ 1603(b)(1-2). This comprehensive definition of a foreign state is used for every provision of the FSIA except two provisions where "foreign state" is specifically defined more narrowly. */ In particular, the broad definition applies to Section 1607, which stipulates that immunity does not apply to counterclaims in any action brought by a "foreign state," including unrelated counterclaims up to the amount of the principal claim. Thus, there is a sound statutory basis for a counterclaim against an agency of the foreign state based on the acts of that state.

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*/ See, Section 1608(a) relating to service of process and Section 1610 relating to execution of judgment.

Moreover, Section 1610(b) of the FSIA expressly authorizes execution of judgment against the assets of an agency of a foreign state pursuant to a claim, inter alia, "for which the agency ... is not immune by virtue of section 1605(a)(3)." The latter establishes district court jurisdiction in expropriation cases in two circumstances: (1) where the property seized, or property exchanged for it, "is located in the United States in connection with a commercial activity" of a foreign state or (2) where the property seized, or property exchanged for it, "is owned or operated by an agency or instrumentality of the foreign state" which is engaged in a commercial activity in the United States.

It is clear that the district courts have jurisdiction to enter judgment against a foreign state on an expropriation claim under Section 1605(a)(3) and that such a judgment may be executed under Section 1610(b) against the property of an agency of that state which is carrying on a commercial activity in the United States, at least when that agency owns or operates property expropriated in violation of international law. It is also reasonable to infer that a judgment can be entered directly against the agency of a foreign state on an alter ego theory either pursuant to Section 1605(a)(3), where the conditions specified in that provision are present, or pursuant to Section 1607, in the case of a counterclaim. In either case, such a judgment can be executed

against the property of that agency pursuant to Section 1610(b).

Thus, the structure of the FSIA manifests the intent of Congress that an agency of a foreign state may be treated as the alter ego of the foreign state in expropriation cases where jurisdiction exists pursuant to either Section 1605(a)(3) or 1607. Such a regime is necessary if American victims of expropriation are to have any hope of relief in the United States courts.

The Second Circuit apparently was misled by references in the legislative history of the FSIA to the fact that one agency of a foreign state is not necessarily liable for the act of a different agency of the same state. See H.R. Rep. No. 1487, 94th Cong., 2d Sess. 29, reprinted in [1976] U.S.

Code Cong. & Ad. News 6604, 6628. Nowhere, however, does the statute or its legislative history imply that the foreign state is not liable for the act of its agency or vice versa. */ In fact, as demonstrated above, the structure of the FSIA indicates a clear congressional intent that the agency of a foreign state may be treated as its alter ego in the case of an expropriation claim or counterclaim.

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*/ The statement by the House Judiciary Committee that the FSIA "is not intended to affect the substantive law of liability" should not be confused with the evident intent of the FSIA to make a foreign state's agencies or instrumentalities amenable to counterclaim for an expropriation committed by the foreign state. H.R. Rep. No. 1487, 94th Cong. 2d Sess. 12 (1976), reprinted in [1976] U.S. Code Cong. & Ad. News 6604, 6610.

III. ALTERNATIVELY, THIS COURT SHOULD HOLD THAT AN AGENCY OF A FOREIGN STATE IS AMENABLE TO AN EXPROPRIATION-RELATED COUNTERCLAIM WHEN THE INTERESTS OF JUSTICE ARE SERVED

If this Court is not prepared to hold that an agency of a foreign state is subject to an expropriation counterclaim whenever the agency meets the definition of a "foreign state" in the FSIA, it should establish criteria for the guidance of the lower courts which will ensure that the principles of justice recognized in the Republic of China case will be given effect in alter ego determinations involving expropriation counterclaims. As discussed above, the standard applied by the Second Circuit in the instant case provides foreign states the means of evading their obligations to

American citizens victimized by expropriations and would frustrate the administration of justice in many different situations. In the present world situation, where American diplomacy is less able to protect citizens investing abroad than in prior years, judicial remedies are of increasing importance to victims of expropriation.

As the Kalamazoo Spice case demonstrates, Cuba is not the only situation where diplomacy has been unable to produce a settlement of claims. There are dozens of unresolved expropriation cases in a variety of developing countries. */ In the case of

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*/ See United States Department of State, Bureau of Intelligence and Research, Disputes Involving U.S. Private Direct Investment: March 1, 1977-February 29, 1980 (August 18, 1980).

Ethiopia, unlike Cuba, the United States government has made no effort to marshall assets for a settlement. There are no blocking orders applicable to Ethiopian assets. Each claimant is left to his own resources, the most important of which may be any hold on assets claimed by Ethiopia. This lever will be meaningless to Kalamazoo Spice if ESESCO is permitted to pursue its claims in the United States courts without being subject to counterclaims based on its expropriation by the PMGSE.

This case and Kalamazoo Spice represent only two of many possible situations where the interests of justice would be served by treating the agency of a foreign state as the alter ego of the foreign state for purposes of expropriation counterclaims.

To be helpful to the lower courts, the Court should take this opportunity to indicate some general criteria that will promote justice rather than injustice in expropriation cases.

Kalamazoo Spice respectfully submits that such criteria should indicate, at a minimum, that an agency or instrumentality of a foreign state which sues an American national in a United States court is amenable to a counterclaim based on an expropriation carried out by the foreign state if, inter alia:

(1) the agency or instrumentality is a corporation or other entity which was the object of the expropriation;

(2) the agency or instrumentality was involved in the expropriation

or in the administration of the expropriated business or property in any significant way;

(3) the agency or instrumentality performed a governmental function related to a general program of nationalization;

(4) the agency or instrumentality would be deemed the alter ego of the foreign state under traditional criteria for piercing the corporate veil; or

(5) the claim asserted by the agency or instrumentality is related to the expropriated business or property.

Kalamazoo Spice's situation demonstrates the manifest need for the first

criterion. When the plaintiff in an American lawsuit is actually an expropriated company suing at the instance of the expropriating state, logic and fair play require that the expropriated company be treated as the alter ego of the expropriating state for purposes of expropriation counterclaims.

The second criterion represents a reformulation of the Second Circuit's approach to give it reasonable scope. With the exception of the expropriated company itself, a government agency responsible for the expropriation or the administration of expropriated property is most closely related to the expropriation and therefore logically most appropriately the subject of an expropriation-related counterclaim.

The third criteria corresponds to the situation in the present case. Bancec performed a governmental function, the facilitation of foreign trade, which included the marketing of expropriated property. In claiming the proceeds of expropriated sugar it was acting for the Government of Cuba and should be liable for the Government's expropriation debts.

The fourth criterion draws upon the experience of the judiciary in dealing with alter ego issues in ordinary domestic cases. For instance, this Court has endorsed the common sense principle that the corporate form may be disregarded when the owners of a corporation exercise complete dominion and disregard the corporate form. See, e.g., NLRB

v. Deena Artware, Inc., 361 U.S. 398, 402-04 (1960). This Court has also recognized the

> equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when so to do would work fraud or injustice.

Taylor v. Standard Gas Co., 306 U.S. 307, 322 (1938). These decisions are based on equitable principles which are relevant to expropriation cases. They reflect a judicial attempt to condition the corporate fiction to the realities of given cases. Such sensitivity is even more necessary in a situation where the owner of the corporation is a foreign state with plenary authority over all corporate forms within its territory.

Kalamazoo Spice's fifth suggested criterion focuses on the nature of the claim,

rather than the nature of the agency bringing suit. If the claim constitutes an attempt to reach assets within the United States, then it constitutes an act of continuing expropriation. A lawsuit filed in the United States in an attempt to enforce rights obtained through an uncompensated expropriation is tantamount to an attempt to give that expropriation extraterritorial effect. Such an effort should, at the very least, be conditioned upon amenability to counterclaims arising out of the same expropriation.

The five criteria overlap somewhat, but none is sufficient to be exclusive. Exclusivity of a particular criterion was the error of the Court of Appeals decision below. Any one of the five criteria would be sufficient for an alter ego finding in a

given case. The thread which unites all the criteria is recognition that in at least these five circumstances the interests of justice cannot allow a foreign state to utilize American courts for its own purposes in expropriation situations while simultaneously denying the jurisidiction of those same courts to ajudicate meritorious expropriation related counterclaims.

CONCLUSION

For the reasons stated, amicus respectfully suggests that the decision below should be reversed. This Court should declare that all agencies or instrumentalities defined as a "foreign state" by the FSIA may be treated as alter egos of a foreign state. In the alternative, this Court should endorse a flexible set of criteria which

ensures that an agency or instrumentality of a foreign state will be amenable to a counterclaim based on an expropriation by the foreign state whenever the interests of justice will be served.

PROOF OF SERVICE

I, John J. McGrath, Jr., counsel for amicus, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 2nd day of December, 1982, I served copies of the foregoing Brief of Kalamazoo Spice Extraction Company Amicus Curiae In Support of Petitioner by mailing and depositing same in the United States Post Office or mail box, with first class postage prepaid, in a duly addressed envelope, to:

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In the Supreme Court of the United States

OCTOBER TERM, 1982

FIRST NATIONAL CITY BANK, PETITIONER

v.

BANCO PARA EL COMERCIO EXTERIOR DE CUBA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a nominally separate agency or instrumentality of a foreign state that brings suit in federal court should be insulated from a set-off or counterclaim arising out of illegal expropriatory acts by the foreign state solely because the agency or instrumentality did not play a "key role" in the particular expropriations that are the subject of the counterclaim.

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INTEREST OF THE UNITED STATES

Protecting overseas commerce and investment, and maintaining legal standards and procedures for that purpose, are important objectives of American foreign policy. Congress has enacted several statutes to further these objectives. See, *e.g.*, 22 U.S.C. 2351(b)(4) and (6) (empowering the President to take steps to discourage expropriations by countries receiving foreign assistance); 22 U.S.C. 2370(e)(1) (requiring suspension of foreign assistance to countries that expropriate American property without timely compensation). Congress also has permitted recourse to federal courts in certain circumstances for adjustment of expropriation claims against foreign sovereigns. See 22 U.S.C. 2370(e)(2) (restricting application of act of state doctrine); 28 U.S.C. 1605(a)(3) (denying sovereign immunity in certain expropriation cases). These statutes, as well as numerous commercial treaties and multilateral conventions, are designed to safeguard overseas

investments and provide for the equitable resolution of transnational investment and commercial disputes.

The decision of the court of appeals severely limits the ability of American claimants to raise valid expropriation claims in proceedings instituted against them in the United States by foreign government instrumentalities. The denial of a right of setoff to American claimants therefore impairs the interests of the United States in the protection of our citizens and their commercial dealings abroad.

STATEMENT

1. This case arises out of events surrounding the Cuban revolution of the late 1950's. Following the violent overthrow of the Batista government, and as part of its efforts to transform the economic, social and political structure of the country, the revolutionary Cuban Government embarked on a broad program of confiscating privately owned property (Pet. App. 3b-7b). On May 17, 1959, the revolutionary government adopted an agrarian reform law that directed a newly created state agency, El Institutio de Reforma Agraria (the National Institute of Agricultural Reform or INRA), to nationalize large land holdings and provide for government-controlled marketing of agricultural exports (*id.* at 5b). Similarly, "interventors" were appointed by the Cuban Government to confiscate enterprises owned by absentee owners of agricultural and other businesses. See generally *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 685 (1976). That same year the Cuban central bank, Banco Nacional de Cuba, was reorganized and placed under the direction of Che Guevara, Minister of State for Cuba (Pet. App. 10a). On April 25, 1960, the Cuban foreign trade bank, Banco Cubano del Comercio Exterior, was reorganized as Banco Para el Comercio Exterior de Cuba (Bancec) (*id.* at 3a) "to contribute to, and collaborate with, the international trade policy of the Government" (*id.* at 4d). Bancec was placed under the direction of the President of Banco Nacional, Che Guevara (*id.* at 10a), with the assistance of delegates

from four government ministries, including INRA (*id.* at 8d-9d).

On August 18, 1960, First National City Bank (Citibank) established an irrevocable letter of credit for $650,000 in favor of Bancec (Pet. App. 13b). The credit covered a shipment of sugar Bancec had acquired from INRA,[1] and was payable at sight on readiness to discharge the cargo in a United States port (*ibid.*). The first call on the letter came on September 15, 1960, when Banco Nacional, acting as Bancec's collection agent, presented Citibank in New York with documents for payment of $217,249.50 (C.A. App. 5a).[2] On September 17, 1960, before Citibank had honored the draw, Cuba expropriated the property and assets of Citibank's Cuban branches and appointed "interventors" to continue their operations (Pet. App. 13b). The expropriations were ordered by Che Guevara and carried out by members of the Cuban Militia acting on orders from officials of Banco Nacional. See *Banco Nacional de Cuba* v. *First National City Bank*, 478 F.2d 191 (2d Cir. 1973). Rather than making payment to Banco Nacional on the letter of credit, Citibank set-off the amounts owing Bancec against the value of its confiscated Cuban assets. Since Citibank's expropriated assets exceeded the amount of the draw on Bancec's letter of credit, Citibank withheld all payment (Pet. App. 13b).[3]

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[1] INRA had acquired the sugar in question on January 15, 1960 from its private owners by "intervention." See Resolution 127 of INRA (J.A. 33). There is no evidence in the record that INRA provided compensation to the original owners of the sugar, although respondent claims that INRA's "intervention" here was in the nature of a receivership. See Answer of Bancec to Brief for the United States as Amicus Curiae 6. However, this Court previously has found that Cuba's acquisition of sugar from private owners was a "compulsory expropriation." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 403 (1964).

[2] "C.A. App." refers to the joint appendix filed in the court of appeals.

[3] In October 1960, Cuba enacted two additional laws providing for further expropriation of business enterprises and private bank-

On February 1, 1961, Bancec brought suit in the United States against Citibank on the letter of credit for the net amount of $193,280.30 (Pet. App. 4a). Citibank counterclaimed for the value of its expropriated branches, alleging that Cuba was the real party in interest in the litigation (*id.* at 15b, 23b). Three weeks later, on February 23, 1961, the Cuban government dissolved Bancec and assigned its rights, claims and assets " 'peculiar to the banking business' " to Banco Nacional; its other interests were transferred to a newly created Ministry of Foreign Trade (*id.* at 4a-5a n.4). On July 6, 1961, at respondent's request, the parties stipulated that the letter of credit claim had passed to the Ministry of Foreign Trade[4] and that the Republic of Cuba should be substituted as plaintiff (*id.* at 15b). The district court approved the stipulation, but an amended complaint was never filed (*ibid.*).

Discovery did not begin in the litigation until 1973. Following trial, but before a decision was rendered, the presiding district court judge died. The case was reassigned to another judge who, with the consent of the parties (Pet. App. 2b), based his decision on the record already developed before the court (*ibid.*).

2. On January 4, 1980, the district court dismissed Bancec's claim. The court held that although Bancec had a right to recover on the unpaid letter of credit, Citibank could set off the full amount of that claim against its losses arising out of Cuba's expropriation of its branches (Pet. App. 22b). In the district court's view, Bancec was

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ing activities (Pet. App. 10b-11b). The latter of these laws declared that banking henceforth was to be a public function conducted only by the State (*id.* at 11b).

[4] The Republic of Cuba asserts that the claim later passed, in turn, from the Ministry of Foreign Trade to the Empresa Cubana de Exportaciones and, upon its dissolution, to the Empresa Cubana Exportadora de Azucar y sus Derivados (Pet. App. 4a-5a n.4). The latter two entities were both government-created agencies or instrumentalities.

properly regarded as the alter ego[5] of the Republic of Cuba for purposes of Citibank's offset. The court found that (*id.* at 15b-16b):

> Bancec and its successors in interest are to be equated with the Cuban Government. Bancec was created by the Government to engage in a state function. All of its capital was contributed by the Government, and it had no function to fulfull, except to manage the export of commodities for the account of the Government. Thereafter, the devolution of the claim, however viewed, brings it into the hands of the Ministry [of Foreign Trade], or Banco Nacional, each an *alter ego* of the Cuban Government [for this purpose].

After noting that Banco Nacional previously had been held to be an alter ego of the Cuban government in similar circumstances, the district court, looking to "the realities of the situation," perceived no legal or factual basis for treating Bancec any differently (Pet. App. 20b). For guidance, the court looked to analogues in the judicial treatment of American government-owned institutions (see, *e.g.*, *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381 (1939)), as well as judicial precedents involving sovereign immunity claims by foreign government agencies and instrumentalities, both before and after the enactment of the Foreign Service Immunities Act of 1976, 28 U.S.C. 1602 *et seq.* (Pet. App. 21b-22b).

Drawing on these authorities, the district court did not consider itself bound by Cuba's characterization of Bancec as "autonomous" (Pet. App. 20b-22b):

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[5] The term "alter ego" traditionally is used to indicate an interrelationship between two entities that justifies disregarding their separate legal status. While the term has been applied most frequently when a parent corporation is held liable for the acts or obligations of a corporate instrumentality, it also is used to encompass the reciprocal situation where a corporate instrumentality is held responsible for the acts or obligations of its parent, particularly in the counterclaim context. See 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations* §§ 37 and 41.3 (perm. ed. 1974).

> Under all of the relevant circumstances shown in this record, including the Stipulated Facts, it is clear that Bancec lacked an independent existence, and was a mere arm of the Cuban Government, performing a purely governmental function. The control of Bancec was exclusively in the hands of the Government, and Bancec was established solely to further Governmental purposes. Moreover, Bancec was totally dependent on the Government for financing and required to remit all of its profits to the Government.
>
> * * * * *
>
> Bancec is not a mere private corporation, the stock of which is owned by the Cuban Government, but an agency of the Cuban Government in the conduct of the sort of matters which even in a country characterized by private capitalism, tend to be supervised and managed by the Government. Where the equities are so strong in favor of the counter-claiming defendants, as they are in this case, the Court should recognize the practicalities of the transactions. Doing justice in the case should not be obfuscated or side-tracked by self-serving recitals in post-revolutionary statutes of the Cuban Government, undoubtedly drawn with litigation of this sort in mind. The Court concludes that Bancec is an *alter ego* of the Cuban Government.

The district court further held (Pet. App. 24b) that Citibank's counterclaim was not precluded by application of the act of state doctrine, relying primarily on this Court's decisions in *First National City Bank* v. *Banco Nacional de Cuba* (*Citibank I*), 406 U.S. 759 (1972), and *National City Bank* v. *Republic of China*, 348 U.S. 356 (1955).[6]

3. The court of appeals reversed. It "agree[d] with the district court's descriptions of Bancec's functions and its status as a wholly-owned instrumentality of the Cuban

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[6] The district court noted (Pet. App. 24b) that Citibank had received a *Bernstein* letter from the Department of State expressing the view that the suit could be maintained without impairing the foreign relations interests of the United States. See *Bernstein* v. *N.V. Nederlandsche*, 210 F.2d 375 (2d Cir. 1954).

government" (Pet. App. 8a). The court concluded, however, that Bancec was not Cuba's alter ego for purposes of the counterclaim (*id.* at 8a-9a):

> [A]n instrumentality of a government is not necessarily an alter ego of that government for all purposes. If the instrumentality has been created as a separate and distinct juridical entity under the laws of the state that owns it, we will normally respect its independent identity for a number of purposes.
> * * *
>
> We will, on the other hand, ignore the statutory distinction between the state and its instrumentality when the subject matter of the counterclaim assertible against the state [is] conduct in which the instrumentality has a key role.

The court of appeals distinguished Citibank's pursuit of its counterclaim against Banco Nacional in *Citibank I* on the ground that Banco Nacional had played a major role in the expropriation of Citibank's branches (Pet. App. 9a). The court believed that it was only by virtue of that conduct that Banco Nacional became an alter ego of the Cuban government for purposes of the expropriation counterclaim (*id.* at 10a). The court viewed Bancec's situation as "materially different" (*id.* at 11a):

> Although Bancec was an instrumentality of the Cuban government, it was principally engaged in promoting foreign trade. It was this engagement that gave rise to the claim it asserts in the present lawsuit. The claim is a purely commercial one having no connection with the revolution or the expropriations—except that the expropriation led Citibank to refuse payment. And Citibank has not shown that Bancec played any role whatever in the expropriations of the Citibank branches.

Although the court of appeals took note of Bancec's dissolution and the subsequent assignment and reassignment of its claim (Pet. App. 4a n.4), it apparently found those facts immaterial to the alter ego issue. The court

similarly ignored the parties' stipulation in 1961 that Cuba was the real party in interest (*id.* at 15b), and did not discuss the relevance of either corporate law precedents or cases involving United States government agencies.[7]

SUMMARY OF ARGUMENT

I.

A. Both courts below properly looked to federal law, rather than state law, in their analysis of the propriety of Citibank's counterclaim against Bancec. The Constitution grants the federal government pervasive power over the international commerce and foreign affairs of the United States, reflecting a need for uniformity in this country's dealings with foreign nations. This concern extends as well to assertions of judicial power, since the exercise of jurisdiction over a foreign sovereign may have a profound effect upon the United States' relations with that government. The issue presented in this case falls squarely within the policies favoring uniformity, since it is fundamentally a question of the power of the United States courts to adjudicate the liabilities of a foreign state in the face of that state's claim that the party before the court is a separate juridical entity.

B. The courts below also properly did not consider themselves bound by Cuba's characterization of Bancec as a separate juridical entity for all purposes. The effect to be given foreign law in United States courts is a question of domestic law. Particularly where a foreign state has chosen to use United States courts in pursuing its claims, the foreign state's law—although entitled to great deference—should not be dispositive of the character of the

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[7] The court of appeals concluded that the Foreign Sovereign Immunities Act of 1976, "assuming that it may be applied retroactively to affect this action" (Pet. App. 11a), supported its holding. The court found that the Act expressed an affirmative intent not "to subject an instrumentality to liability for acts or transactions with which it had no connection, which were done or entered into by other agencies or instrumentalities of the state" (*id.* at 12a).

parties and claims before the court. Moreover, modern choice of law doctrine indicates that United States courts should not be bound to apply Cuban law in the circumstances of this case, where the transaction at issue was the sale and delivery of a shipment of sugar to the United States and collection of payment was to be made in the United States from an American bank.

II.

The court of appeals erred in adopting a mechanical two-step rule for determining whether a foreign instrumentality should be considered an alter ego of the state for purposes of a counterclaim based upon an expropriation. Although we agree with the court of appeals that there should be a presumption in favor of recognizing the juridical autonomy conferred upon foreign state-owned instrumentalities by their own law, we disagree with the court of appeals' holding that a state instrumentality cannot be considered amenable to an expropriation counterclaim unless the instrumentality played a "key role" in the expropriation. The court of appeals' test completely forecloses reliance upon the factors that traditionally have provided the basis for equitable determinations of the status of the parties and claims before United States courts. Instead of being confined to determining whether an instrumentality played a "key role" in an expropriation, United States courts should properly consider a number of other factors that traditionally have guided courts' use of their equitable powers.

A. Corporate law long has recognized that a corporation should be considered the alter ego of its parent or subsidiary if the corporation is organized or managed with a disregard of its separate existence. Instrumentalities of a foreign sovereign should be subject to similar scrutiny, particularly when the sovereign exercises unfettered power to create, dissolve, and control its instrumentalities and to assign their assets and liabilities free from legal constraints. Here, there is ample evidence that Ban-

cec enjoyed no meaningful autonomy. Bancec was completely capitalized by the Cuban government, remitted its profits to Cuba, and served only to manage the export of commodities for the account of Cuba. When it suited the Cuban government's purposes, Bancec was summarily dissolved and its assets and functions distributed to other government agencies and instrumentalities. Indeed, after Bancec's dissolution, respondent's counsel stipulated that Cuba itself should be substituted for Bancec as plaintiff.

B. The court of appeals failed to give sufficient weight to the public, governmental nature of Bancec's function. Deference to the juridical independence of an instrumentality of a foreign state is not appropriate where the instrumentality primarily serves to discharge a government function or the foreign state deals with the instrumentality as if it were a government agency. In this case, Bancec was an instrument of Cuban national economic policy, with the function of assuming title to commodities expropriated by Cuba and arranging for their export and sale. Bancec's board of directors was composed entirely of Cuban government officials, and it was headed by Che Guevara, who simultaneously was Minister of State and President of the Cuban central bank, Banco Nacional. In these circumstances, it is appropriate to hold Bancec liable for the illegal expropriatory acts of the Cuban government.

C. It is also clear that the real party in interest in this case is Cuba, not Bancec. Cuba is the beneficiary of the claim involved in this case. Bancec no longer exists, having been dissolved by Cuba over 20 years ago. The district court found that at the time of Bancec's dissolution by the Cuban government, Bancec's claim against Citibank under the letter of credit devolved to Banco Nacional, which has previously been found to be the alter ego of the Cuban government for the purposes of the expropriation of Citibank's Cuban branches. Although Cuba now contends that the claim passed instead to the Ministry of Trade, that entity, too, is an arm of the Cuban government. Respondent recognized this fact early in the litigation when its

counsel stipulated that Cuba itself should be substituted for Bancec as plaintiff.

D. Finally, equitable concerns require that Bancec be found an appropriate counterclaim defendant in this case. Where a foreign sovereign avails itself of United States courts to enforce a claim, considerations of fairness require particularly close scrutiny of the sovereign's assertions that the American defendant should be prevented from raising its claims or defenses in response. A foreign state coming into United States courts should not be permitted to raise insubstantial corporate formalities as a shield against the interests of justice.

ARGUMENT

I. FEDERAL LAW MUST DETERMINE WHEN A FOREIGN STATE OR ITS INSTRUMENTALITIES MAY BE SUBJECT TO THE JURISDICTION OF THE COURTS OF THE UNITED STATES

Although federal jurisdiction in this action was founded on diversity of citizenship under 28 U.S.C. 1332, both courts below correctly looked to federal rather than state law in analyzing the propriety of Citibank's counterclaim. Federal law must be dispositive on the issue of when a foreign state or its instrumentality will be subject to the jurisdiction of United States courts. Moreover, in articulating the applicable principles of federal law, the law of the foreign state, while relevant, cannot be determinative, particularly where it is the foreign state or its instrumentality that is resisting a counterclaim while seeking recourse to our courts.

A. The amenability of foreign states and their instrumentalities to suit in United States courts is a uniquely federal question

As this Court has stated, "[f]or local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889). The provisions of

the Constitution that grant the federal government pervasive power over international commerce and foreign affairs (see Article I, Section 8, Clauses 3 and 10; Article II, Sections 2 and 3; Article III, Section 2) reflect "a concern for uniformity in this country's dealings with foreign nations and * * * a desire to give matters of international significance to the jurisdiction of federal institutions." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427 n.25 (1964).

This concern is particularly germane to assertions of judicial power. "Every judicial action exercising or relinquishing jurisdiction over * * * a foreign government has its effect upon our relations with that government." *Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945). See also *Ex parte Peru*, 318 U.S. 578, 588-589 (1943). Indeed, a foreign sovereign may perceive a particular assertion of jurisdiction as "an affront to its dignity," with profound implications for the United States' foreign relations. *Mexico* v. *Hoffman*, *supra*, 324 U.S. at 35-36.

The issue presented in this case is fundamentally a question regarding the competence and power of our courts over foreign states. While variously characterized by the courts below as a question of "real party in interest" (Pet. App. 15b), "alter ego" (*id.* at 13a, 16b), and "independent identity" (*id.* at 9a), at bottom the case presents the issue of when our courts may adjudicate the liabilities of a foreign state notwithstanding its claim that the party before the court is a separate juridical entity. This obviously is a matter of great potential sensitivity in our relations with foreign states. It calls for a uniform rule for all foreign states or government instrumentalities that may become parties to judicial proceedings in the United States. Only federal law can furnish such a standard.[8]

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[8] Although it deals generally with the amenability of foreign nations to suit in federal court, the Foreign Sovereign Immunities Act of 1976 (FSIA) 28 U.S.C. 1602 *et seq.*, does not resolve the question of when an allegedly separate entity can be equated with a foreign state. Indeed, in enacting the FSIA, Congress expressly chose

B. Foreign law cannot be dispositive of litigation brought in United States courts by instrumentalities of foreign states

Both courts below did not consider themselves bound by Cuba's characterization of Bancec as a separate juridical entity for all purposes. The effect to be given foreign law in United States courts is, of course, a question of domestic law. *Hilton* v. *Guyot*, 159 U.S. 113 (1895). And, at least where a foreign state has chosen to take advantage of a United States forum to pursue its claims, its own law should not be dispositive regarding the character of the parties and claims before the court. See 6 M. Whiteman, *Digest of International Law* 709 (1968), citing *Republic of Rumania* v. *Constantinescu*, 45 Am. J.

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not to resolve the alter ego issue. As the House Report stated (H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 12 (1976)):

> The bill is not intended to affect * * * the attribution of responsibility between or among entities of a foreign state; for example, whether the proper entity of a foreign state has been sued, or whether an entity sued is liable in whole or in part for the claimed wrong.

The Act instead focuses on the scope of federal jurisdiction and the sovereign immunity that will be accorded to foreign states by United States courts pursuant to international law. To be sure, the Act does acknowledge that foreign government instrumentalities may constitute separate juridical identities in appropriate cases, entitled (with their property) to recognition under United States law. See 28 U.S.C. 1610(b); H.R. Rep. No. 94-1487, *supra*, at 15-16. But the legislative history of the Act also adverts to the possibility of cases where this will not be true (*ibid.*), and the Act itself does not provide any standards for making this determination. As with many other questions that must be addressed in applying the Act (see *id.* at 16 (courts are to determine what is a " 'commercial activity' ")), Congress expected questions of attribution to be resolved by the courts on the basis of judicially developed legal principles. Thus, the court of appeals' conclusion (Pet. App. 12a) that the FSIA supports its holding in this case is erroneous. The Act simply does not address "the attribution of responsibility between or among entities of a foreign state" (H.R. Rep. No. 94-1487, *supra*, at 12).

Int'l L. 799-800 (1951) (High Ct. Zurich, Switz.), and *Republic of Haiti* v. *Plesch*, 195 Misc. 219, 88 N.Y.S.2d 9, 10 (1949). Cf. *Tabacalera Severiano Jorge, S.A.* v. *Standard Cigar Co.*, 392 F.2d 706, 714-715 (5th Cir.), cert. denied, 393 U.S. 924 (1968) (foreign act of state need not be recognized where it purports to affect United States territory). While foreign law should be given significant weight, it cannot be allowed to defeat the interests of justice.[9] The court of appeals gave undue deference to the characterization advanced by Cuba.

Modern choice of law doctrine also indicates that United States courts should not be bound to apply Cuban law in the circumstances of this case. See, *e.g.*, *Restatement (Second) of Conflict of Laws* §§ 6 and 145 (1971); *Restatement (Second) Foreign Relations Law of the United States* § 66 comment a (1965). The commercial transactions underlying Bancec's claim had substantial contacts with the United States. The transaction at issue was the sale and delivery of a shipment of sugar to the United States. Moreover, the letter of credit upon which Bancec sued was issued in New York City (C.A. App. 631), and collection of payment was to be made in the United States. Bancec voluntarily appeared in the courts of the United States to pursue its claims. See *Restatement (Second) of Conflict of Laws* § 125 (1971) (law of forum state determines proper and necessary parties to an action). These

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[9] Domestic courts are commonly called upon to evaluate the actual relationship between a state and its government instrumentalities, notwithstanding the provisions of foreign law, in other contexts, including the evaluation of claims to sovereign immunity by government corporations (see I. Brownlie, *Principles of Public International Law* 341 (3d ed. 1979); S. Sucharitkul, *State Immunities and Trading Activities in International Law* 104-161 (1959); 9 Ga. J. Int'l & Comp. L. 111, 115 (1979)) and evaluation of claims of *force majeure* by instrumentalities that seek to rely on the state's directives defensively (see Becker, *The Rolimpex Exit from International Contract Responsibility*, 10 N.Y.U. J. Int'l L. & Pol. 447 (1978)).

contacts with the United States provide ample grounds for looking to the law of the forum to protect the interests of justice.[10] See, *e.g.*, *Restatement (Second) Foreign Relations Law of the United States* §§ 17, 18 and 19 (1965).

II. WHETHER A STATE INSTRUMENTALITY PLAYED A "KEY ROLE" IN A PARTICULAR UNLAWFUL EXPROPRIATION SHOULD NOT BE THE SINGLE, CONCLUSIVE FACTOR IN DETERMINING WHETHER THE INSTRUMENTALITY SHOULD BE CONSIDERED AN ALTER EGO OF THE STATE

The court of appeals adopted a mechanical two-step rule for determining whether a foreign instrumentality should be considered an alter ego of the state for purposes of an expropriation counterclaim (Pet. App. 8a-9a): (1) under the foreign state's law, is the instrumentality treated as a separate juridical entity?; (2) if so, did the agency nevertheless play a "key role" in the foreign state's expropriations so as to incur the state's liabilities? [11] In essence, under the court of appeals' approach, foreign law determines the cognizability of an expropriation counterclaim against the instrumentality of a foreign state, subject to a single, narrow exception based on United States law, which comes into play only when an instrumentality has acted in concert with the state in committing the wrong. That exception, moreover, is largely illusory, since a state instrumentality that played a "key role" in the wrongful activity would be a joint tortfeasor, liable on its own account.

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[10] Where, by treaty, the United States has agreed with a foreign state to apply certain legal standards, those standards would of course govern the court's determination. No such treaty, however, is in force between the United States and Cuba.

[11] Although some passages of the court of appeals' opinion might be read to import a broader rule, its disregard of the factual record developed in the district court strongly suggests the court of appeals believed, pursuant to its "key role" test, that these other factors identified by the district court were not relevant to the issue whether Bancec is Cuba's alter ego.

The United States agrees with the first half of the court of appeals' test. There should be a presumption in favor of recognizing the judicial autonomy conferred on foreign state-owned instrumentalities by their own laws. As the House Report on the Foreign Sovereign Immunities Act of 1976 states (H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 29-30 (1976)):

> If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary.

Moreover, the United States has established dozens of government incorporated entities to perform defined functions independently of day-to-day government control. See, *e.g.*, 31 U.S.C. 846 (listing many government-organized corporations). Domestic law provides for the separate juridical identity of these corporations within the United States. Many of these government-owned corporations, however, do business abroad and engage in international commercial transactions. Under principles of reciprocity and comity, the treatment of foreign government instrumentalities in United States courts can be expected to have a material influence on how foreign states and courts treat United States' government-owned corporations abroad.

Notwithstanding our agreement with the first half of the court of appeals' test, we believe that the second leg of the court's rule is unnecessarily restrictive. By limiting a state instrumentality's liability solely to those instances where the instrumentality plays a "key role" in the wrong complained of, the court of appeals has completely disregarded the question of the common identity of the nominal plaintiff and the state. The court of appeals "key role" test, moreover, forecloses reliance on the factors that traditionally have guided equitable determinations of the status of the parties and claims before United States courts. If left undisturbed, the decision may well

permit United States courts to become collection vehicles for expropriating foreign governments, while leaving American nationals without a fair opportunity to raise counterclaims based upon their injury under international law.

When a nominally separate foreign government instrumentality avails itself of our courts, its status as the alter ego of its parent state should be determined by equitable considerations. The "key role" test adopted by the court of appeals, however, improperly confines the scope of judicial scrutiny. In addition to whether or not an entity played a "key role" in allegedly illegal conduct, a court should be permitted to consider other factors, discussed below, in determining whether to hold a state-owned entity liable for conduct of the state itself.

A. Principles of corporate law address the question of when courts should disregard a corporation's separate legal identity

This Court, and the lower federal courts, have not hesitated to "pierce the corporate veil" to avoid miscarriages of justice in proceedings involving corporations and their parents or subsidiaries. While acknowledging that recognition of separate identity is the rule, rather than the exception, the Court has carefully scrutinized a broad range of factors in determining whether particular entities are truly separate. See, *e.g.*, *NLRB* v. *Deena Artware, Inc.*, 361 U.S. 398, 402-404 (1960) (footnotes omitted):

> [A]s Mr. Justice Cardozo said in *Berkey* v. *Third Avenue R. Co.*, 244 N.Y. 84, 95, 155 N.E. 58, 61, "Dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent. Where control is less than this, we are remitted to the tests of honesty and justice." That is not a complete catalogue. The several companies may be represented as one. Apart from that is the question whether in fact the economic enterprise is one, the

> corporate forms being largely paper arrangements that do not reflect the business realities. One company may in fact be operating as a division of another; one may be only a shell, inadequately financed, the affairs of the group may be so intermingled that no distinct corporate lines are maintained. These are some, though by no means all, of the relevant considerations, as the authorities recognize.

Accord, *Pepper* v. *Litton*, 308 U.S. 295, 310 (1939); *Consolidated Rock Co.* v. *Du Bois*, 312 U.S. 510, 523-524 (1941); *Davis* v. *Alexander*, 269 U.S. 114, 117 (1925); see 1 W. Fletcher, *supra*, at §§ 41-46.

Similarly, when the United States has created corporate instrumentalities to perform specified functions, but retained control over the instrumentalities' finances, management, and operations, this Court has looked beyond the corporate form to treat the United States and its instrumentalities as one.[12] See *Rainwater* v. *United States*, 356 U.S. 590, 591-592 (1958); *Cherry Cotton Mills, Inc.* v. *United States*, 327 U.S. 536, 539 (1946); *Emergency Fleet Corp* v. *Western Union*, 275 U.S. 415, 424-426 (1928). Instrumentalities of foreign sovereigns should be subject to similar scrutiny. Their claim to separate juridical status cannot be resolved simply by reliance on their organic statute or laws of incorporation. Foreign states often have unfettered power to create, dissolve, and control their instrumentalities, and to assign their assets and liabilities, free from traditional legal constraints.[13]

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[12] While these considerations are relevant to an analysis of the relationship between a foreign state and its instrumentalities, no single factor is conclusive. In analyzing the relationship between a foreign state and its agencies and instrumentalities, a flexible approach is required because of the difficulty of proving many facts concerning a foreign nation's treatment of its instrumentalities.

[13] The brief existence of Bancec, the manner of its subsequent dissolution, and the dispersal of its claims among other corporate entities that similarly blinked into and out of existence vividly demonstrates the control Cuba has exerted over state-owned instrumentalities. See Pet. App. 4a-5a n.4. These changes in corporate

Foreign law, therefore, cannot be allowed to shield state-owned instrumentalities from careful scrutiny under American law to ensure the equitable attribution of liabilities.

There is ample evidence in the record that Bancec enjoyed no meaningful autonomy from the Cuban government in conducting its business. The district court determined that Bancec "had no function to fulfill, except to manage the export of commodities for the account of the Government" (Pet. App. 16b). When it suited the Cuban government's purposes, Bancec was summarily dissolved and its assets and functions were distributed to other agencies and instrumentalities of the Cuban government (*id.* at 4a-5a n.4, 14b-15b). While Bancec was completely capitalized by Cuba and remitted its profits to the Cuban government, like other state-owned corporations (*id.* at 3a-4a), the district court found that Bancec was not "a mere private corporation, the stock of which is owned by the Cuban Government, but an agency of the Cuban Government in the conduct of the sort of matters which even in a country characterized by private capitalism, tend to be supervised and managed by Government" (*id.* at 22b). Bancec's president was Cuba's Minister of State and President of Banco Nacional (*id.* at 9a-10a); its board was not a body of independent directors, but rather delegates from several government ministries, managing their common venture (*id.* at 4a). Indeed, after the dissolution of Bancec, respondent's counsel stipulated that Cuba itself should be substituted for Bancec as the plaintiff (*id.* at 15b).

The Cuban government's close control over Bancec establishes that Bancec properly should be viewed as an alter ego of Cuba itself. The indicia of control that United States courts have traditionally analyzed in de-

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status reflect the approach of a government more interested in rapidly achieving its public policy—expropriation—than in utilizing its publicly chartered corporations to engage in legitimate commercial activities.

termining that a corporation and its parent are alter egos are found here. See, *e.g.*, *Rainwater* v. *United States*, *supra*, 356 U.S. at 592 (instrumentality is simply "administrative device" for government); *Cherry Cotton Mills, Inc.* v. *United States*, *supra*, 327 U.S. at 539 (instrumentality is created to accomplish "purely governmental purposes"); *Consolidated Rock Co.* v. *Du Bois*, *supra*, 312 U.S. at 519, 522 (parent corporation manages, operates, and finances subsidiary); *Pepper* v. *Litton*, *supra*, 308 U.S. at 310 (dominance and exploitation of corporation by controlling shareholder); *Davis* v. *Alexander*, *supra*, 269 U.S. at 117 (parent and subsidiary operated as a single company); *Chicago, Milwaukee & St. Paul Ry.* v. *Minneapolis Civic & Commerce Association*, 247 U.S. 490, 497-498 (1918) (common officers and directors and common operation of the two corporations); *NLRB* v. *Deena Artware, Inc.*, *supra*, 361 U.S. at 399-401 (corporations share common officers and directors and are components of a "'single enterprise'"). These factors are of even greater importance in the circumstances of this case, where the revolutionary Cuban government was in the midst of sweeping social, economic, and legal changes and where state instrumentalities were suddenly created and summarily dissolved as required to meet immediate political goals. The record of the Cuban government's close control over Bancec establishes that Bancec has no legitimate claim to independence from the Cuban government. The court of appeals erred in ignoring this evidence and instead finding Bancec to be an independent entity solely on the basis that it played no "key role" in the expropriation of Citibank's Cuban branches.

B. The public character of a state instrumentality's activities is indicative of its autonomy from the state

The court of appeals failed to give sufficient consideration to the public, governmental nature of Bancec's functions. As the functions of a state instrumentality approach those of the government itself, a state is less

likely—and less able—to delegate them to another entity without assuming responsibility for their exercise. This principle may be articulated either as a presumption that instrumentalities which perform important government functions are so likely to be subject to the direct control of the state that they lack genuine autonomy or as a conclusion of law that certain governmental functions are non-delegable.

Separate juridical status ordinarily is accorded to certain state instrumentalities on the theory that their functions are limited to correspond with activities that might be underaken by private parties. Most frequently, their purpose is to accomplish specific commercial tasks free from day-to-day direction by the state. Even the state trading companies of communist states have been found to satisfy this standard, if they demonstrate proper separation from their parent governments. See *C. Czarnikow Ltd.* v. *Centrala Handlu Zagranicznego Rolimpex*, [1979] A.C. 351 (H.L.). This legal and practical autonomy entitles state instrumentalities to sue and be sued in their own name and to answer only for their own wrongs. See generally H.R. Rep. No. 94-1487, *supra*, at 15-16.

On the other hand, when the activities of a state instrumentality become more subject to the government's day-to-day control or fall more clearly into the public sphere in which only a government can act, its claims to autonomy become more attenuated. See *Rainwater* v. *United States*, *supra*, 356 U.S. at 591-592; *Cherry Cotton Mills, Inc.* v. *United States*, *supra*, 327 U.S. at 539; *cf. Edlow International Co.* v. *Nuklearna Elektrarna Krsko*, 441 F. Supp. 827, 832 (D.D.C. 1977). Under the jurisprudence of many countries, a state instrumentality may become eligible in these circumstances to benefit from the sovereign's immunity from suit.[14] By the same token, such

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[14] See, *e.g.*, the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1605, which accords immunity to public, noncommercial acts of government-owned corporations. See also *Krajina* v. *TASS Agency*, [1949] 2 All Eng. Rep. 274 (C.A.) (TASS, although a "juridical person," is not a separate entity and is therefore entitled to

a close relationship may deprive the instrumentality of a defense of *force majeure* or of supervening illegality based upon its own government's subsequent legislation. Cf. *C. Czarnikow Ltd.* v. *Centrala Handlu Zagranicznego Rolimpex, supra.* An instrumentality of an unrecognized government also may be excluded from the use of United States courts, even though a private corporation chartered by that same government might be permitted to sue. See *Federal Republic of Germany* v. *Elicofon*, 358 F. Supp. 747 (E.D.N.Y. 1972), aff'd, 478 F.2d 231 (2d Cir. 1973), cert. denied, 415 U.S. 931 (1974); cf. *Transportes Aereos De Angola (TAAG)* v. *Ronair, Inc.*, 544 F. Supp. 858 (D. Del. 1982). Government instrumentalities also are more likely to be subject to the direct control of the state to ensure that their activities conform with changing public policy. The state may exercise this control either by sporadic political intervention into the instrumentality's affairs, or by legal provisions that make officials of the state the instrumentality's governing authorities. In either case, third parties cannot reasonably be expected to consider the instrumentality as a separate legal entity.[15]

Unlike the court of appeals, the district court carefully considered the public nature of Bancec's responsibilities in concluding that it was an alter ego of the Cuban state. Bancec was an instrument of Cuban national economic policy, designed to cooperate with and contribute to foreign trade programs adopted by Banco Nacional (Pet. App. 4d). To insure that its activities conformed with state policy, Bancec's governing board was composed en-

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sovereign immunity); *Yessenin-Volpin* v. *Novosti Press Agency*, 443 F. Supp. 849, 852 (S.D.N.Y. 1978) (same).

[15] Decisions of lower courts dealing with the legal status of the instrumentalities of socialist states have recognized that an instrumentality of a foreign state should be considered, for purposes of sovereign immunity, as part of that state when the instrumentality's principal purpose is to discharge a state function and the foreign government exercises control over the instrumentality's operations. See *Yessenin-Volpin* v. *Novosti Press Agency, supra*, 443 F. Supp. at 854.

tirely of Cuban government officials (*id.* at 8d-9d), headed by Che Guevara as Minister of State and President of Banco Nacional (*ibid.*; *id.* at 10a). In contrast with other state commercial instrumentalities Bancec was not simply financed by the government, but was also used as a tool for implementing government policy. See, *e.g.*, *Houston* v. *Murmansk Shipping Co.*, 87 F.R.D. 71, 74 n.5 (D. Md. 1980); *Icenogle* v. *Olympic Airways, S.A.*, 82 F.R.D. 36, 39 n.3 (D.D.C. 1979); *Edlow International Co.* v. *Nuklearna Elektrarna Krsko*, *supra*, 441 F. Supp. at 832; compare *Arango* v. *Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1379 (5th Cir. 1980). Moreover, Bancec performed an important function for the revolutionary Cuban government by assuming title to commodities seized by Cuba under its nationalization program and arranging for their export and sale. See note 1, *supra*; *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 404-405 (1964). As the district court found, Bancec was "a mere arm of the Cuban Government, performing a purely governmental function. The control of Bancec was exclusively in the hands of the Government, and Bancec was established solely to further Governmental purposes" (Pet. App. 20b-21b).

In these circumstances, the district court correctly held Bancec liable for the illegal expropriatory acts of the Cuban government. Where a state instrumentality primarily serves a public, governmental function, its claim of "autonomy" from the foreign government itself must be viewed with skepticism. This is particularly true where, as here, the instrumentality has helped its parent government effectuate a public program violative of international law. The court of appeals' "key role" test only partially recognizes this principle. The court of appeals is correct in holding that when an instrumentality actively contributes to the very wrong at issue, it cannot retreat into a shell of autonomy for purposes of resisting valid claims for restitution. But the instrumentality's separate standing also is compromised to the extent it

departs from strictly commercial functions to assist in a broad program of expropriation. Although not dispositive, an instrumentality's assistance in the unlawful program of the state is properly considered in arriving at the equitable balance underlying a determination whether the instrumentality and the state are alter egos.

C. The identity of the real party in interest is fundamental to the determination of the permissibility of a counterclaim

A foreign state's pursuit of a claim in the name of its instrumentality does not conclusively resolve the question of who, in fact, is the party before the court. Federal courts are empowered to examine who will be the actual beneficiary of any recovery in a litigation, as well as the history of the chain of title to the claim, in determining whether to permit an offset against the plaintiff's recovery. See Fed. R. Civ. P. 13 (counterclaims); 17(a) (real party in interest);[16] 25(c) (substitution of parties). See also 28 U.S.C. 1607 (federal jurisdiction over counterclaims against foreign states). When a foreign state has dissolved a nominally separate entity by decree, it cannot be permitted to take refuge behind the abandoned corporate shell to defeat a valid counterclaim. This is particularly true in cases such as this one, where Cuba has consistently exercised control over the claim by initially taking the claim for itself, then reassigning the

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[16] Federal Rule of Civil Procedure 17(a) requires that "[e]very action shall be prosecuted in the name of the real party in interest." The rule assures that the action is brought by the party who is entitled to enforce the right in question so that a defendant will not be subjected to repeated litigation on a single claim. See 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1543, at 643 (1971); *Pacific Coast Agricultural Export Association* v. *Sunkist Growers, Inc.*, 526 F.2d 1196, 1208 (9th Cir. 1975), cert. denied, 425 U.S. 959 (1976). Importantly, the rule also enables a defendant to raise in a single case whatever defenses it has against the real party in interest. See *Virginia Electric & Power Co.* v. *Westinghouse Electric Corp.*, 485 F.2d 78 (4th Cir. 1973), cert. denied, 415 U.S. 935 (1974).

claim to its agencies or instrumentalities. See note 4, *supra*. Because the real party in interest in this action is the government of Cuba, Citibank should be allowed to assert its counterclaim based on the illegal expropriation of its assets by the Cuban government.

The Cuban government—not Bancec—is the beneficiary of the claim involved in this case. The claim here arises out of the sale of sugar acquired through "intervention" by the Cuban government. Although Bancec was utilized to effectuate that sale, profits from the sale were not to be credited to Bancec's account but were to be deposited in the Cuban treasury (Pet. App. 3a-4a). Bancec, moreover, no longer exists, and the string of events since its demise clearly demonstrates that the Cuban government—not some long defunct corporate shell—is the actual party before the Court.

Three weeks after this suit was commenced, the Cuban government dissolved Bancec, tranferring its functions and assets to other government agencies and instrumentalities (Pet. App. 4a-5a n.4). Bancec's assets " 'peculiar to the banking business' " (*id.* at 13b) devolved upon Banco Nacional, while its other assets were assigned to the Ministry of Foreign Trade (*id.* at 14b). Although there is some dispute regarding the actual devolution of the claim in this case,[17] the claim, however its assignment is viewed, passed to "an *alter ego* of the Cuban Government" (*id.* at 16b), because Banco Nacional has previously been held to be such an alter ego (*Banco Nacional de Cuba* v. *First National City Bank*, 478 F.2d 191, 193-194 (2d Cir. 1973)), and the "Ministry of Foreign Trade is no different than the Government of which its minister is a member" (Pet. App. 16b). Moreover, early in the litigation, the

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[17] The district court reasoned that the letter of credit claim, being a chose in action typically "regarded as being the sort of asset, right and claim peculiar to the banking business, * * * probably should be regarded as vested in Banco Nacional" (Pet. App. 13b-14b). Plaintiff asserted that the claim passed to the Ministry of Foreign Trade (see *id.* at 16b).

parties in fact stipulated that the Republic of Cuba should be substituted for Bancec as the plaintiff (*id.* at 15b).[18]

The Cuban government should not be permitted to defeat a valid counterclaim by proceeding in the name of an instrumentality that has not existed for over two decades. Since it is Cuba that is actually enforcing this claim, the court of appeals erred in failing to permit Citibank to offset against Cuba's claim the value of its wrongfully expropriated assets.[19] In *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R.R.*, 417 U.S. 703, 713 (1974), this Court refused to permit a parent corporation to bring suit in the name of its subsidiary where the parent itself plainly was barred from suit. The Court held that the parent, "the principal beneficiary of any recovery and itself estopped from complaining of petitioners' alleged wrongs, cannot avoid the command of equity through the guise of proceeding in the name of respondent corporations which it owns and controls." 417 U.S. at 713. Cuba similarly cannot avoid the command of equity by proceeding through the guise of a now-nonexistent corporate entity it once owned and controlled. See *Standard Lime & Cement Co.* v. *United States*, 503 F. Supp. 938, 941 (W.D. Mich. 1980) (parent corporation found to be real party in interest for subsidiary's tax refund claim where the subsidiary's assets and business had been transferred to the parent and the subsidiary continued to exist only in form).

There is yet another reason why Cuba should be considered the real party in interest in this litigation. The panel of the court of appeals that decided this case recog-

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[18] Although the district court approved the stipulation, Cuba was never formally substituted for Bancec as plaintiff (Pet. App. 15b).

[19] The fact that Cuba may have reassigned the claim since it originally passed to either Banco Nacional or the Ministry of Foreign Trade does not alter the conclusion that Cuba is the real party in interest here. Citibank propounded its counterclaim in its original answer of March 6, 1961 (C.A. App. 8a), two weeks after Bancec's dissolution. Respondent cannot defeat a valid counterclaim by reassigning its direct claim after the counterclaim has been raised.

nized in a companion case decided the same day that Cuba is the real party in interest on claims that pass from the government to its instrumentalities. In *Banco Nacional de Cuba* v. *Chemical Bank New York Trust Co.*, 658 F.2d 903 (2d Cir. 1981), the court of appeals found that Cuba, not Banco Nacional, was the real party in interest with respect to a lawsuit brought by Banco Nacional to recover sums that several private Cuban banks had deposited with New York banks prior to the private banks' expropriation. Although Banco Nacional obtained the assets of the private banks following expropriation, "Banco Nacional must be viewed as pursuing those claims on behalf of the Cuban government" because the Cuban government initially expropriated the assets and only later transferred them to Banco Nacional. *Id.* at 910. The principles applied in *Chemical Bank* are equally applicable here. Even if Bancec originally had an independent, legitimate claim against Citibank, that claim would have become subject to Citibank's rights to set-off and counterclaim when Cuba dissolved Bancec and assumed its rights on February 23, 1961. Subsequent efforts to re-transfer the claim to other government instrumentalities could not free the claim from Citibank's right to set-off. As in *Chemical Bank*, the court of appeals should have found Cuba to be the real party in interest here, and thus an appropriate defendant to Citibank's counterclaim.

D. Special equitable concerns are implicated when a foreign plaintiff relies on the putatively separate status of a state-owned instrumentality to defeat a valid counterclaim

When a foreign state brings suit in United States courts to enforce a legal right, courts should give particular attention to the procedural posture in which an alter ego question arises. This Court has held that a foreign state invoking the aid of a United States forum may properly be subject to a wider range of counterclaims than

might otherwise be brought in a direct action against the state. See *National City Bank* v. *Republic of China*, 348 U.S. 356 (1955); *First National City Bank* v. *Banco Nacional de Cuba* (*Citibank I*), 406 U.S. 759 (1972). These same equitable concerns support particularly close scrutiny of alter ego questions when a foreign government instrumentality seeks to defeat adjudication of a valid counterclaim on the ground that the plaintiff is nominally distinct from its parent state.

In *National City Bank* v. *Republic of China*, *supra*, 348 U.S. at 364-365, this Court held that when "[a] sovereign has freely come as a suitor into our courts * * * the consideration of fair dealing" permits the American defendant to assert unrelated counterclaims against the foreign sovereign up to the amount of its own recovery. Thus, when a foreign state has invoked our laws, it may not do so "free from the claims of justice" (*id.* at 362). This restriction on general concepts of sovereign immunity has now been codified in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1607(c). See H.R. Rep. No. 94-1487, *supra*, at 23.

In *Citibank I*, this Court resolved the related question whether the act of state doctrine bars the prosecution of a counterclaim arising from the expropriation of property within the foreign state's territory. A majority of the Court held that the act of state doctrine does not bar such a counterclaim.[20] Rather, as in *Republic of China*, the Court held that a counterclaim may be interposed by an

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[20] The plurality held that the act of state doctrine was not a bar to the counterclaim there at issue because the Department of State, in a *Bernstein* letter, had represented to the Court that application of that doctrine would not advance the interests of American foreign policy. 406 U.S. at 762-770. Justice Douglas considered the case controlled by *Republic of China*. *Id.* at 770-773. Justice Powell concluded that permitting the counterclaim would not interfere with the delicate foreign relations supervised by the political branches of government. *Id.* at 773-776.

American defendant to defeat any affirmative recovery against it.[21]

The quesion presented in this case—whether Bancec is properly viewed as an alter ego of Cuba and thus is amenable to a counterclaim based on Cuba's expropriation—is closely linked to the questions decided in *Republic of China* and *Citibank I*. While this Court's past decisions do not resolve the issue here, this case raises the same equitable concerns that prompted the Court in *Republic of China* and *Citibank I* to permit counterclaims by American defendants against foreign sovereigns who invoke the assistance of our courts. When a foreign state seeks to use United States law to recover through our courts, it should not be permitted to assert its own law to defeat otherwise valid counterclaims unless its law accurately reflects the status of the parties and claims before the court. Insubstantial corporate formalities, like sovereign immunity, may not be utilized by foreign states as a shield against "the claims of justice." *National City Bank* v. *Republic of China*, *supra*, 348 U.S. at 362. "In such cases, courts of equity, piercing all fictions and disguises, will deal with the substance of the action and not blindly adhere to the corporate form." *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R.R.*, *supra*, 417 U.S. at 713.

III. THE DISTRICT COURT REASONABLY DETERMINED THAT BANCEC WAS CUBA'S ALTER EGO FOR PURPOSES OF CITIBANK'S COUNTERCLAIM

The district court, on the basis of many of the foregoing factors, concluded that Citibank could properly offset Bancec's claim by the value of its expropriated assets. The court detailed the evidence showing Cuba's domi-

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[21] On remand in *Citibank I*, the court of appeals upheld Citibank's counterclaim, finding that Cuba's expropriation of its branches had been retaliatory, discriminatory, and without compensation, in violation of international law. 478 F.2d at 191.

nance and control of Bancec (see, *e.g.*, Pet. App. 15b-16b, 22b). The court noted cases where government corporations, because of their relationship to their parent, had been held to be an arm of that government, sharing "in the privileges, responsibilities and immunities of that Government" (*id.* at 21b, citing *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381 (1939)). The court emphasized that Bancec was essentially "an agency of the Cuban Government" (Pet. App. 22b) and therefore had scant claim to autonomy from that government. The court found that Cuba was the real party in interest in this litigation (*id.* at 15b) because after the demise of Bancec the present claim devolved either upon Banco Nacional or the Ministry of Foreign Trade, "each an *alter ego* of the Cuban Government" (*id.* at 16b). Finally, the court recognized that where a state-owned entity seeks recovery while attempting to avoid a legitimate counterclaim against the state, "the Court should recognize the practicalities of the transactions" (*id.* at 22b). In short, the district court carefully analyzed the factors set forth in this brief in the course of "[d]oing justice in the case" (*ibid.*).

The court of appeals, on the other hand, limited its equitable analysis to a single inquiry: did Bancec play a "key role" in Cuba's expropriation of Citibank's Cuban branches? The court of appeals' willingness to ignore the substantial factors probed, examined and balanced by the district court illustrates the serious shortcomings of its narrow legal standard.

Resolution of the question whether Bancec and Cuba are alter egos cannot depend on any single fact or test. Like other equitable determinations, resolution of this issue must be informed by the totality of the circumstances, based upon the full factual record. The district court's determination that Bancec should be regarded as Cuba's alter ego is fully supported by judicial precedent and the record developed below. During its transient existence, Bancec played a material role in effectuating the Cuban

expropriation program and was certainly no stranger to the unlawful public policy upon which Citibank's counterclaim is based. Bancec should not be permitted to invoke the protection of American law entirely "free from the claims of justice." *National City Bank* v. *Republic of China, supra,* 348 U.S. at 362. The district court's just and reasonable ruling should not have been disturbed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Docket Sheet

NO. 81-984-CFX	TITLE	First National City Bank, Petitioner v. Banco Para El Comercio Exterior De Cuba
VIDE: 81-982		

DOCKETED	COURT
Nov. 25, 1981	United States Court of Appeals for the Second Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Henry Harfield
	Counsel for Respondent: Victor Rabinowitz
Nov. 25, 1981	Petition for writ of certiorari filed. (Record filed).
Dec. 7, 1981	Order extending time to file a response to the petition until Jan. 25, 1982.
Jan. 25, 1982	Brief for the respondent in opposition filed.
Jan. 27, 1982	DISTRIBUTED. 2-19.
Feb. 2, 1981	Reply brief for the petitioner filed. (D).
Feb. 22, 1982	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Sept. 21, 1982	Brief, amicus curiae, for the U. S. filed.
Sept. 29, 1982	DISTRIBUTED. 10-15.
Oct. 8, 1982	Reply brief of respondent to brief, amicus curiae, for the U. S. filed. (D).
Oct. 18, 1982	Petition GRANTED.

Dec. 2, 1982	Brief for the petitioner filed.
Dec. 2, 1982	Brief, amicus curiae, of Kalamazoo Spice Extraction Company in support of petitioner filed.
Dec. 2, 1982	Joint appendix filed.
Dec. 8, 1982	Brief, amicus curiae, of the U. S. in support of petitioner filed.
Dec. 8, 1982	Order extending time to file respondent's brief on the merits until Jan. 7, 1983. (orally, ALS)
Dec. 23, 1982	Application for leave to file respondent's brief on the merits in excess of page limitations, and order granting same by Marshall, J., 12/29/82, not to exceed 75 pages, inclusive of the appendix.
Dec. 14, 1982	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan. 10, 1983	The motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument is GRANTED.
Jan. 10, 1983	Brief, amicus curiae, of The International Center for Law Development filed.

(Over)

81-984

Title

No.

DATE	PROCEEDINGS AND ORDERS
Jan. 10, 1983	Brief for the respondent filed.
Jan. 25, 1983	CIRCULATED.
March 14, 1983	Motion of the Solicitor General to permit Richard G. Wilkins, Esquire, to present oral argument pro hac vice on behalf of the United States as amicus curiae filed.
March 21, 1983	The motion of the Solicitor General to permit Richard G. Wilkins, Esquire, to present oral argument pro hac vice on behalf of the United States as amicus curiae is granted.
March 18, 1983	Petitioner's reply brief filed. (D).
March 28, 1983	ARGUED.